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The Law Commission

Working Paper No. 105

Transfer of Land
Title on Death

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Transfer of Land
Title on Death

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THE LAW COMMISSION

WORKING PAPER NO. 105

TRANSFER OF LAND
TITLE ON DEATH

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FOOTNOTE ABBREVIATIONS

Statutes

A.E.A.	Administration of Estates Act 1925
L.P.A.	Law of Property Act 1925
T.A.	Trustee Act 1925
S.L.A.	Settled Land Act 1925
L.R.A.	Land Registration Act 1925
I.E.A.	Intestates' Estates Act 1952
L.C.A.	Land Charges Act 1972

Statutory Instruments

L.R.R.	Land Registration Rules 1925 (S.R. & O. 1925, No. 1093)
N.-C.P.R.	Non-Contentious Probate Rules (S.I. 1954/796)

Textbooks

Emmet	Emmet on Title 19th ed.
M. & W.	Megarry and Wade, The Law of Real Property 5th ed., (1984)
P. & C.	Parry and Clark, The Law of Succession 8th ed., (1983)
R. & R.	Ruoff and Roper, Registered Conveyancing 5th ed., (1986)
Snell	Snell's Equity 28th ed., (1982)
T. & C.	Tristram & Coote's Probate Practice 26th ed., (1983)
W. & C.	Wolstenholme & Cherry, Conveyancing Statutes 13th ed., (1972)
W., M. & S.	Williams, Mortimer & Sunnucks, Executors, Administrators and Probate 16th ed., (1982)

SUMMARY

In this working paper the Law Commission examines, as part of its programme for the modernisation and simplification of conveyancing, the law relating to the passage of estates and interests in land following the death of a land-owner. The paper considers various conveyancing aspects of the administration of estates, with particular reference to the differences between the powers of executors and administrators and the operation of assents, in particular, implied and deemed assents. Comments are invited on all the matters discussed and the various proposals for reform put forward. The purpose of this paper is to obtain the widest possible range of views from all those involved in the administration of estates.

THE LAW COMMISSION

ITEM IX OF THE FIRST PROGRAMME
TRANSFER OF LAND
TITLE ON DEATH

PART I
INTRODUCTION

1.1 This working paper examines aspects of the passage of estates and interests in land following the death of a land-owner. It has been prepared as part of our general programme of modernising and simplifying land transfer but covers an area which was mentioned specifically in the Second Report of the Conveyancing Committee[1] which dealt with conveyancing simplification. In our Nineteenth Annual Report[2] we had cited as examples of problems that had arisen "the differences as to powers between administrators and executors, the chain of representation, and the efficacy of assents, especially implied assents." Finally, we commented that "a general re-examination of the topic appears called for."

1.2 The Law Commission is extremely grateful to Professor Alan Prichard, LL.B., of the University of Nottingham, for his exceptional contribution in research and writing to the preparation of this working paper.

1.3 In the course of the preparation of this paper we have become aware of a number of problems faced by conveyancers when a death has occurred, problems which might perhaps not be regarded as strictly ones

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1 Published by H.M.S.O. in January 1985. We reproduce the relevant passage in Appendix I.

2 Nineteenth Annual Report 1983-1984, Law Com. No. 140, para. 2.39.

of title. It seems to us that these problems can both sensibly and properly be considered in this paper and any reforms that may eventually emerge for them ought to be effected on the same occasion as any reforms of the strictly titular matters.

1.4 The matters of title to be considered will cover what landed property vested in a deceased or under his control at his death passes and does not pass; in whom it becomes vested and when and how; what evidence is required to show that passage and vesting; how the property may be transmitted to another representative during the course of the administration of the deceased's estate; what evidence is required to show such transmission; and how the property passes out of administration whether into the hands of some sort of purchaser from the repesentative or into those of an entitled beneficiary. The special features associated with title to settled land will also be considered. In the overall strict context of title the major problems to be discussed will be those already referred to - the powers of administrators in contrast with those of executors, the effects and defects of the chain of representation, and the operation of assents, particularly implied and deemed assents, highlighted by the decision in Re King's Will Trusts.[3]

1.5 As regards wider conveyancing issues we shall consider the impact of death where notices relating to land have to be served, the problems caused by a party's death during the course of a sale and the difficulties engendered by the requirements of the land charges legislation when the chargor has died. We also advert to problems caused by the deduction of title to leaseholds in respect of representatives' liability on covenants.

1.6 In this paper the subject as a whole will be treated and problems discussed with possible solutions suggested in three Parts:

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3 [1964] Ch. 542.

(i) direct devolution from the deceased; (ii) devolution from representative to representative within administration; and (iii) devolution from representative to purchaser or beneficiary. The last section will be sub-divided between transactions with purchasers and passage to beneficiaries. Not surprisingly, there will be some overlapping and some inevitable repetition. In this Introductory Part we shall be hoping to set the overall scene for the discussion of the later Parts by describing the chain of representation and indicating how it exemplifies the overlapping of conveyancing policies with those of administration of estates; by giving a very brief résumé of the evolution of the modern law of administration; and by outlining a special feature of the 1925 property legislation, the use of declarations and presumptions upon which purchasers may rely. As will be seen the existing laws and practices are seldom other than complicated, technical and difficult to grasp. The principal statutory provisions referred to in the paper are reproduced in Appendix II.

1.7 The whole topic is, of course, only part, and in many ways a consequential part, of the general subject of the administration of the estates of deceased persons. That large subject may well need at some time, and perhaps sooner than later, scrutiny with a view to reforms, but that exercise lies beyond the remit of this paper. The chain of representation gives a very good example of the difficulties and limitations which this demarcation imposes.

1.8 The chain of representation is an historic doctrine of the law of administration of estates, now enshrined in the 1925 property legislation.[4] The doctrine can be defined as being that the executor of a deceased takes on any sole or surviving[5] executorship the deceased held

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4 A.E.A., s. 7.

5 If there is more than one executor the death of one of them leaves the survivor or survivors to continue to administer the estate and there is no transmission.

regardless of the number of such transmissions of executorship[6] there may have been. The chain is, however, broken and the doctrine either will not apply or ceases to apply whenever an administrator takes over full[7] administration of the estate. This will most frequently[8] occur in three types of case: (a) where there is an intestacy; (b) where a testator fails to appoint an executor; (c) where an executor renounces or fails to obtain probate.[9] Thus a full administratorship, whether to the original deceased's estate or to that of an executor, will exclude or end the operation of a chain.

1.9 The existence of a chain can be a great help in achieving a conveyancing transaction simply, speedily and cheaply. Conveyancers have often breathed a contented sigh on finding that executors alone have appeared on the title, and have just as often groaned on discovering that the chain has been broken and that at the least one or more grants of administration de bonis non[10] need to be taken out to perfect the title.

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6 The executor must in each case prove the will of the deceased: see A.E.A., s. 7(1). Moreover, if a non-proving executor (X) subsequently proves the will (of Y), that proving will terminate the transmission by the chain to an executor of a fellow executor who had already proved Y's will, but the chain may of course continue on from X: ibid. An executor appointed by the court in the special circumstances of s. 50 of the Administration of Justice Act 1985 is expressly excluded from any part of a chain: see s. 50(2)(a) (and similarly under the Supreme Court Act 1981, s. 114(4), where an extra personal representative is appointed by the court to act during a minority or a life interest: see s. 114(5)).

7 A mere temporary grant of administration does not break a chain if a probate is subsequently granted: see A.E.A., s. 7(3).

8 It can, of course, also occur, e.g., where a probate is revoked for any reason.

9 See A.E.A., s. 7(3).

10 A grant limited to a deceased's unadministered estate, the purpose of which is to enable the administration of the estate to be completed.

If conveyancing values were the only ones to be taken into consideration, an extension of the chain doctrine to include administrators would seem to make excellent sense. However, the existing doctrine rests upon an historic philosophy which should perhaps be abandoned or modified only after a total consideration of the whole law of administration: the executor is chosen by the testator and the recipient of his confidence, whereas the administrator is the nominee of a court selected on depersonalised principles of law. The philosophy is obviously questionable on the issue whether an original testator's confidence can fairly be expected to run through a series of appointments of executors by executors, but the philosophy is in any case much less important today than a consequential problem of the chain which involves a much wider policy than mere conveyancing. The problem is at its most acute where a deceased is a member of a profession and has accumulated a large number of executorships in that capacity: that deceased's own executor, very often a widow or widower without such professional capacity, will either have to renounce probate (and, incidentally, thus break the chain) or have to take on the burden of all the executorships. Such a consideration fairly suggests a case not for the widening of the chain, but for its restriction or even abolition: or for the introduction of totally new solutions.

1.10 Comprehensive reform, then, of the chain of representation and other aspects of the general law of administration of estates should await a fuller review of that general law. In the meantime this paper will seek to find and to discuss conveyancing ameliorations that do not pre-empt policy decisions on the wider law. At the same time it will be valuable if any of those ameliorations could not only fit in with the existing general law, but also continue to operate effectively if ever that law is changed in some perhaps predictable way - or at least either be readily adaptable or cease to be needed and become obsolete in the light of such a change.

1.11 The history of the law of administration of estates and of its conveyancing consequences is a fascinating one, typical of English property law: full of intricate, and often baffling, technicalities. Happily,

modern legislation, especially that of 1925, has greatly simplified the law, so that only the briefest conspectus of that history is needed in a paper such as this. Again consistently with the overall story of property law, probably the biggest legacy today of this historical evolution is the often peculiar terminology which is still employed.

1.12 Administration of estates is the process whereby the law provides that, after the due collection of the assets of the deceased, his surviving obligations are fulfilled and his debts paid, and thereafter remaining assets are passed to those entitled under his will or upon his intestacy. Originally, in medieval times, freehold land stood outside this process because the feudal system viewed tenure of such land less as the property of the tenant than as an inter-relation of rights and duties between lord and man that overrode and excluded the claims of mere general creditors; while the almost universal absence of any lawful power to leave such land by will meant that it passed automatically to the heir. This meant that chattels (and later emerging intangible properties) and leasehold land were in the beginning the only property subject to "administration" and to the possibility of testamentary disposition. As it happened, with an unusual neatness for English legal history, the distinction coincided with the one between real and personal property, freehold land being originally the only major asset that could be recovered specifically in the common law courts by actions in rem, while all other property could be compensated for only in money on an action for damages in personam.[11]

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11 Land in unfree tenure, later copyhold, could not be sued for at all in the "national" courts in the crucial early medieval period and so was not realty. It was, however, scarcely personalty either except insofar as there may have been a theory that all that was not real had to be personal. Its devolution on death was as much outside the realms of administration as freehold was for much the same feudal reasons.

1.13 Administration of deceaseds' personalty was originally within the jurisdiction of the ecclesiastical courts, but over the centuries that jurisdiction was gradually lost to the secular courts, the last step being the giving of the functions of probate of wills and granting of letters of administration to the newly formed Court of Probate in 1858. Otherwise, although there were many particular reforms, some of great importance, the history of administration has the appearance of a steady approximation of realty to personalty and of administrators to executors. The first process was virtually completed by the 1925 legislation, but the second is still far from total, as has been shown in the discussion of the chain of representation. By and large it can be said that nowadays realty and personalty are subjected to the same legal regime of administration, both being administered by personal representatives, who will be executors if appointed as such by the deceased in his will and administrators if appointed by the court[12] in default of there being any executor.

1.14 Because the supervision of the functions of personal representatives[13] fell more and more within the jurisdiction of the Court of Chancery in post-Reformation times,[14] the remedies, and in consequence the rules, are largely equitable. This has led to a further

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12 With the exception of the anomalous additional "executor" appointed under the Administration of Justice Act 1985, s. 50 and the unspecified "personal representative" under the Supreme Court Act 1981, s. 114(4); see n. 6 above.

13 Administration of estates in the strict sense, as distinct from the process of probate of wills and grants of representation generally, which fell into a separate "probate" jurisdiction, which from 1875 till 1969 was vested in the Probate, Divorce and Admiralty Division of the High Court and has, since then in respect of uncontested cases, been vested in the Family Division.

14 For a good brief summary, see Snell, pp. 306-7.

approximation of the position of personal representative to that of trustee,[15] but that process has been far from total. In particular, whereas in private trusts[16] there will always be a separate equitable interest in a beneficiary with the trustee holding a legal, or sometimes even equitable, interest upon which it is dependent, there is no such separation in ownership while administration lasts. Until administration is completed, those who become entitled under the will or upon intestacy if the estate proves solvent[17] have remedies to safeguard their potential rights, but no property interest as such.[18] The personal representative accordingly seems to have a more extensive control over the beneficial ownership than a trustee has. However, to characterise him as any sort of temporary beneficial owner is probably dangerous: as representative (as distinct from potential beneficiary) he has few personal benefits and rights over the property and is perhaps best regarded as an estate owner holding property for purposes - those of administration - and not for beneficiaries (on a vague analogy with the charitable trustee). Whatever the true analysis, there seems to be little or no authority to suggest whether the distinction from trusteeship carries with it any specific conveyancing difference. The autre droit of the personal representative was apparently the earliest exception to the doctrine of merger of estates

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15 See e.g., T.A., s. 68(17), and its inclusive definition.

16 Public, viz. charitable, trusts stand outside any attempt at such analysis because purposes, not beneficiaries, are involved.

17 Commonly also called "beneficiaries" though distinct from beneficiaries under a trust.

18 See, e.g., Commissioners of Stamp Duties (Queensland) v. Livingston [1965] A.C. 694; Eastbourne Mutual B.S. v. Hastings Corpn. [1965] 1 W.L.R. 861; and Snell, pp. 26-7, 337-8, where the position of a specific devisee or legatee is differentiated with his interest being characterised as "property" whilst others potentially entitled are said to have merely a "floating equity". The fact that the specific beneficiary may lose his interest because it is needed to pay debts seems to make the distinction somewhat hollow.

that the common law recognised[19] and may even have suggested something deeper than a mere difference in capacity: whether it precludes the ease of transmission in capacity which equity encourages elsewhere is highly debatable.[20]

1.15 The basis for the modern law of administration is the Administration of Estates Act 1925.[21] That Act, besides effecting reforms to the general law of administration of assets, also participated[22] in the overall policy of the 1925 property legislation to simplify conveyancing. That policy concentrated on promoting the ease, speed and cheapness of the acquisition of legal estates and interests in land on the principle that the ordinary purchaser or mortgagee[23] will normally be concerned to deal only with such legal estates or interests. Such purchasers[24] are, so far as possible, to be safeguarded from having to investigate the "equities" by means of what have come to be called "curtain" principles: the bona fide purchaser, if he follows the correct procedures and pays any capital money to the right recipient, will take his legal interest free of equities, which will in turn attach instead to the money paid over. This process, known as "overreaching", applies to dispositions by settled land estate owners, trustees for sale, personal representatives and, to an extent, mortgagees, although there are

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19 See Pinchon's Case (1611) 9 Co. 88b; 2 Inst. 236; and W., M. & S., p. 461. "Autre droit" - or as it sometimes appears, "auter droit" - can perhaps best be translated as 'differentiated title'.

20 See para. 4.20 below.

21 Amended in particular by the Intestates' Estates Act 1952 in respect of rights of beneficiaries upon distribution.

22 Particularly in the provisions of Part III of the Act.

23 Or tenant where he has access to the landlord's title.

24 In the broad sense including mortgagees and other disponees giving value.

differences in operation between them all. To facilitate such overreaching and to maintain the necessary curtain, the 1925 legislation has devised a considerable number of presumptions for purchasers to rely upon and to this end has provided that various declarations occurring in instruments can engender such presumptions. By and large these facilitating declarations apply only to dispositions of legal estates and interests. Perhaps it was felt that those dealing with those equitable interests that are normally found behind curtains are usually "within the family" or otherwise not open-market purchasers and so do not require the curtain protection. Whatever the explanation, some of the major strains on the property legislation have occurred when open-market purchasers have been forced to scrutinise the equities because the curtain has failed to extend to their transaction. A typical case is where a sole surviving beneficiary under a trust for sale has sought to end the trust without a sale and thus to become sole beneficial owner. Few, if any, of the presumptions and declarations are then available to aid simple, safe conveyancing. Happily, experience suggests that one of the great merits of the registered land system has been that its curtaining is much more effective and extensive than is found in the old unregistered one.

1.16 The declaration in these cases will normally be made by someone who, usually through his legal advisers, will know or be taken to know the full facts which, but for the statutory provision, would need to be investigated by the purchaser. Such declarations and similar devices for presumptions are found particularly in the Settled Land Act and the Administration of Estates Act. They take a variety of forms. Thus section 110(2) of the Settled Land Act provides a comprehensive set of presumptions if the statutory forms of documentation are observed. On the other hand, section 110(5) of the same Act generates presumptions where there is an absence of a statement. Any matter behind a curtain can be covered, not just equitable entitlement. Thus section 38 of the Trustee Act protects a purchaser from having to check some of the grounds, but by no means all, upon which new trustees have been appointed under section 36 of the Act: thus if the former trustee is dead

or an infant this is provable by normal means such as death and birth certificates, while if he is desirous of retiring he shows it by joining in the appointment.

1.17 The effect of these declarations will be at least to risk a diminution of the safeguards for beneficiaries' interests. If a purchaser can get a good title without checking certain facts, theoretical possibilities for fraud or for loss or confusion through carelessness can be envisaged. Thus a scheming tenant for life could, with the aid of a confederate, in theory make away with the whole value of the settled land where a purchaser relied upon sections 7(5) and 110(5) of the Settled Land Act. Whether the fact that, as far as we are aware, this has never happened is due to the uprightness or the lack of imagination of the aristocracy or to the inevitable involvement of lawyers or any other reason, the risk taken by the draftsmen of the Act so far at least seems to have been justified. Similarly there does not yet seem to have been any case of a trustee who has fallen out with another trying to replace him by an accomplice as might conceivably happen on a break-up of a marriage or other relationship - perhaps a much more probable instance for fraud.[25]

1.18 The various presumptions are sometimes said to be "conclusive",[26] while at other times the evidence is said to be merely "sufficient". The classic example of the distinction is one of the very few cases that have ever been reported in respect of these presumptions: Re Duce and Boots Cash Chemists (Southern) Ltd.'s Contract,[27] where a

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25 Still less, the chance that each trustee produces his re-appointment to remove the other - an impasse the statute does not cater for.

26 See, e.g., S.L.A., s. 110(1).

27 [1937] Ch. 642: see para. 4.17 below.

recital of a beneficial provision in a will indicated the error in an assent and so deprived a purchaser of the protection of section 36(7) of the Administration of Estates Act. However, the distinction is often not so clear-cut anyhow because the conclusiveness of a presumption may be severely qualified by its operating in favour only of a bona fide purchaser.[28] All in all it can be concluded that, while the presumptions and declarations are extremely helpful and useful, and normally very reliable, the conveyancer must still use his skill, judgment and commonsense rather than rely on blanket protection. Moreover, even though such devices will be less frequently used and needed where the land is registered, the Land Registry itself frequently relies on the certificates and declarations conveyancers make in application forms for first registration of title.

1.19 Since the 1925 legislation came into force developments elsewhere in the law have served to narrow the already apparently negligible risks. A misstatement will now frequently give rise to liability in damages[29] even where fraud cannot be proved. Perhaps even more significantly, any conveyancer who displays negligence in the giving of a declaration by his client will probably be liable in damages to the affected beneficiaries.[30] It would, however, be fair to add that there appears to be very little evidence that conveyancers have ever misused or mishandled these statutory devices, especially since Re Duce & Boots exemplified the limits within which those devices operate.

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28 As in S.L.A., s. 110(1).

29 In negligence under the doctrine of Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465 and, where there is a contractual nexus, under the Misrepresentation Act 1967, s. 2.

30 On the lines of the liability in Ross v. Caunters [1980] Ch. 297.

1.20 Any conclusions which we reach in this working paper are provisional only and are published for the purpose of consultation. We shall be very glad to receive comments on such conclusions and on the other matters discussed, although we would stress again that we are concerned with the conveyancing aspects of administration of estates and are not attempting in this exercise to consider full-scale reform of the general law of administration. We hope to publish a report in due course setting out our final recommendations.

PART II

DIRECT DEVOLUTION FROM DECEASED

2.1 The modern more or less comprehensive system whereby both the realty and the personalty devolves to the personal representatives dates back to the reforms of the Land Transfer Act 1897.[1] That Act left much to be desired in its drafting and the enactment of the 1925 property legislation affected the overall position too, so that the system is now enshrined in the Administration of Estates Act of that year.[2]

The property devolved

2.2 The basic principle is that property which the deceased held in some capacity up till his death or over which he had some control as to its destination when he died passes to his personal representatives. However, this area of the law of administration and distribution is complicated and, analytically at least, very untidy. At least five separate overlapping, but by no means conterminous lists can be set out: (i) property devolving on personal representatives; (ii) property in respect of which the Revenue may have taxation claims; (iii) property[3] available for payment of the deceased's other debts; (iv) property out of which a court may make provision for family and dependants over and above any provision made by the deceased's will or by the rules of intestacy;[4] and (v) property which may pass beneficially to some other person by reason of the act (or occasionally omission) of the deceased.[5] Whether there is need for such

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1 In particular, s. 1.

2 Especially, Part I (ss. 1-3).

3 Or "assets" as they are normally called for this purpose: see A.E.A., s. 32(1).

4 Under the Inheritance (Provision for Family and Dependants) Act 1975.

5 E.g., under a special power of appointment.

diversity is really a matter for consideration whenever the wider topic of administration of estates may come under scrutiny with a view to reform and simplification. Whatever may be the inconvenience for the various claimants in this lack of uniformity, there seems to have been no real conveyancing difficulty arising specifically from it. By and large it is to be assumed that bona fide purchasers from whoever holds the legal estate will be protected provided they follow normal conveyancing procedures.[6] We would be very grateful to receive details of any instances where conveyancing problems have arisen with respect to dealing with any property of a deceased[7] which has not devolved on his representatives.

2.3 Several of the principal anomalies in this respect appear not to affect land, but merely pure personalty. Thus, land disposed of by the deceased in his will under a general power of appointment devolves to a personal represenative[8] and thereby becomes available for payment of debts, while pure personalty does not so devolve but its availability for debts, once a common law rule, is now covered by statute.[9] Again, because it appears that there can be donationes mortis causa[10] only of pure personalty,[11] the difficulties associated with those gifts[12] do not

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6 E.g., searching the land charges register to ensure there is no D(i) charge entered by the Revenue.

7 Or under his control.

8 A.E.A., s. 3(2).

9 A.E.A., s. 32(1): which covers both real and personal estate. See W., M. & S., p. 549, for the position today.

10 A gift by a person on the point of death, for the requirements of which see W., M. & S., Ch. 48.

11 See Duffield v. Elwes (1827) 1 Bli. (N.S.) 497; W., M. & S., p. 538; P. & C., pp. 21-3. Queried by P.H. Pettit, Equity and the Law of Trusts 5th ed., (1984), p. 104.

12 W., M. & S., Chap. 48. See also S.W. Smith, "'Donationes Mortis Causa' and the Payment of Debts", [1978] Conv. 130.

seem to affect land, other than perhaps mortgage securities which will pass if the debts they secure are passed.[13] However, as will be seen, some anomalies do still affect the landed property of the deceased.

2.4 In passing, reference may be made to a curious anomaly in terminology adopted by the draftsmen of the 1925 legislation in this context. This is the use of "real estate" to include leaseholds.[14] Having assimilated "real estate" to chattels real for purposes of devolution,[15] the draftsmen then include chattels real in the definition of real estate.[16] Thereafter, the major distinction throughout the Administration of Estates Act is between real and personal estate, but except for Part IV of the Act[17] that distinction is not the traditional one between realty and personalty, but in effect that between land and pure personalty.[18] Presumably, practitioners are now so enured to this transformation that it is merely laymen and students who are likely to suffer confusion. It would be helpful to know, however, if any conveyancers have experienced any difficulty by reason of the choice of wording. Otherwise it is supposed that any elimination of the anomaly can safely await the eventual reform or consolidation of the whole statute.

2.5 If one states the general rule that all the deceased's interests in land devolve on his personal representatives, that rule will need to be

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13 W., M. & S., Chap. 48, especially pp. 538, 539.

14 Or "chattels real" as the A.E.A. also prefers to designate them: see, e.g., ss. 1-3.

15 As also for distribution in Part IV of the Act.

16 S. 3(1)(i).

17 See s. 52.

18 See ss. 3(1), 55(1)(xix).

qualified by two lists: one negative, which excludes or explains away certain items that might seem to come within the principle; the other positive, which includes certain seemingly extra items.

2.6 The first list contains a number of interests which are excluded by reason of their ceasing to exist as such on the death of the holder. The major examples are - (i) any interest held in joint tenancy (except where the deceased was the sole surviving tenant[19]); (ii) life interests of the deceased (other than interests pur autre vie, which pass to the general personal representative whether or not the interest is in settled land[20]). In both cases there may be a liability to tax, and in the former case, but not the latter, a claim may lie for provision for family or dependants under the Inheritance (Provision for Family and Dependants) Act 1975.[21] Neither would seem to be available for payment of debts.

2.7 Entailed interests, which like life interests can now exist only in equity,[22] pass directly to the appropriate heirs,[23] unless they have been duly barred by the deceased in his will[24]: in which case they do devolve on his general personal representatives.[25] If the deceased held the legal estate as Settled Land Act estate owner,[26] then (as in the case

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19 An apparent, rather than real, exception, because, of course, the deceased was sole owner when he became last survivor.

20 See M. & W., p. 94; W., M. & S., pp. 524-5.

21 S. 9.

22 L.P.A., s. 1(3).

23 A.E.A., s. 3(3), and L.P.A., s. 130.

24 Under L.P.A., s. 176.

25 A.E.A. s. 3(2).

26 Under S.L.A., ss. 19, 20.

of life interests and other interests with a strict settlement) that estate will devolve separately, normally to special personal representatives as will be seen.[27] With entails there may also be liability for tax and for family provision, but not for payment of debts unless they are barred by the will. Probably very few entails exist these days.

2.8 While a tenancy at will[28] is an interest that ceases on death,[29] even the shortest periodic tenancy or unexpired contractual term will devolve on the personal representatives, along with any rights to renew, whether under contractual options or conferred by statute. However, in one particular instance, a very curious result occurs. If the deceased was at death a protected contractual tenant under the Rent Acts,[30] the contractual term duly devolves on his personal representatives, but it is kept in a state more or less of suspended animation[31] if his spouse or other qualifying member of his family takes the benefit of the statutory transmission.[32] The statutory tenancy itself is a mere personal status of irremovability and not a sufficient estate or interest in land to pass as part of the deceased's assets. Because the contractual tenancy appears to continue to be a protected one within the definition of section 1, it will apparently attract the rules prohibiting premiums[33] and so will be in effect unsaleable (and virtually valueless in many cases).

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27 See paras. 2.36-2.40 below.

28 See M. & W., pp. 654-5. "Tenancies" at sufferance are not property at all and so cannot devolve at all anyhow: M. & W. pp. 655-6.

29 Turner v. Barnes (1862) 2 B. & S. 435.

30 Rent Act 1977, s. 1.

31 Moodie v. Hosegood [1952] A.C. 61.

32 Rent Act 1977, s. 2 and Sched. 1, Part I.

33 Under Part IX of the Act, especially s. 120.

2.9 Land vested in a corporation sole does not devolve on his personal representative on death, but passes to his successor in office.[34] The rules relating to corporations sole have always been technical, idiosyncratic and even downright odd in some respects,[35] but statute[36] has helped to straighten out some of the difficulties conveyancers might face, especially with regard to events affecting land-holding during the period before a successor is appointed.

2.10 It would be helpful to know whether any conveyancing problems have been encountered with respect to any of these instances where land vested in the deceased has not passed to his personal representative.

2.11 The "positive" list is scarcely less complicated. Besides interests held by the deceased as a beneficial owner, any land he held as sole trustee or sole Settled Land Act estate owner will pass to his personal representatives.[37] If he were a co-trustee, his legal estate would of course accrue to the surviving trustee or trustees and not devolve.

2.12 Although there is thus a guaranteed continuity with respect to trust lands, the position as to land held by a personal representative is markedly different. In this case there will be no devolution from the sole representative unless he is an executor appointing an executor and all the requirements of the chain of representation are fulfilled.[38] Moreover, it

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34 A.E.A., s. 3(5).

35 See M. & W., pp. 51-2 for an excellent short summary.

36 Especially L.P.A., s. 180.

37 A.E.A., s. 3(1)(ii); the settled land estate will pass to special representatives - see paras. 2.36-2.40 below.

38 See para. 1.8 above.

seems that in respect of settled land there can be no chain even from a special executor[39]: such an executor, being necessarily the trustee of the settlement,[40] could appoint as his own special executor only someone who is "trustee at his death"[41] and ex hypothesi there will be no such trustee even if he appoints a new one in his will.

2.13 Perhaps out of extreme caution statute[42] has classifed land held by way of mortgage or security as real estate, devolving on the representatives as such, but the money secured or charged remains personal estate. Whereas in theory one representative might transfer the debt without the co-operation of his fellow representatives, it seems highly unlikely that this ever happens today since the security itself would have to be transferred by all together.[43] Similarly, the equitable interest behind a trust for sale (even, it would seem, a statutory trust, which the courts have more and more been coming to regard as virtually an interest in land in some respects[44]) is not real estate,[45] although the trustees' legal estate clearly is. It would be of help to know if these distinctions have ever caused difficulties in conveyancing.

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39 See T. & C., p. 327, referring to a Registrar's Direction (1936) 21 July.

40 A.E.A., s. 22(1).

41 Ibid.

42 A.E.A., s. 3(1)(ii).

43 See W. & C., Vol. 5, p. 18. See also W., M. & S., pp. 525-6, re mortgages generally.

44 See, e.g., William & Glyn's Bank Ltd. v. Boland [1981] A.C. 487.

45 A.E.A., s. 3(1)(ii).

2.14 As already pointed out,[46] land disposed of in his will by a deceased under a general power of appointment devolves to his personal representatives. Because of the operation of the Wills Act 1837[47] such powers are often exercised by gifts in generalised terms, so much so that perhaps failure to exercise the power will rarely occur where the donee of the power leaves a will. Although unappointed property does not devolve and is not available to general creditors, it will be subject to liability for tax and for family provision. True special powers,[48] whether exercised or not, fall outside all the various liabilities[49] and the property subject to them never devolves on the representatives. Problems arise from the various difficulties associated with the different species of hybrid powers,[50] but these and other complications[51] should rarely affect a purchaser of a legal estate because, as with entails, the interests involved will normally lie behind an appropriate statutory curtain. Again, it would greatly assist if we could be informed of any difficulties that have arisen in practice in respect of day to day conveyancing by reason of these powers and their exercise.

The manner of devolution

Executors

2.15 The classic principle is that the executor gets his title and

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46 See para. 2.3 above: A.E.A., s. 3(2).

47 S. 27.

48 That is, powers which the donee cannot exercise in his own favour.

49 Although an appointment may, of course, have tax consequences in respect of the liability of the beneficiary, and even perhaps the donor of the power.

50 See, e.g., W., M. & S., pp. 551-2.

51 Including those relating to appointments by deed taking effect on the appointor's death. See generally W., M. & S., pp. 548-52.

authority from the will and so is executor from the death of the testator, whereas an administrator[52] takes office, albeit with some retrospective consequences,[53] only from the grant of letters of administration. This means that probate, unlike letters of administration, is not a vestitive act. However, although an executor can validly and effectively do a large number of legal acts and transactions before getting probate, it is notoriously dangerous not only for him to do so except in real emergencies but also for the person dealing with him to rely on evidence of executorship less than probate.[54] Besides the fact that the executor unduly delaying taking out probate may be liable for criminal sanctions,[55] both parties will be vulnerable to risk that the seeming last will appointing the executor was replaced by a later one or otherwise revoked or void for some other reason. Once probate has been obtained protection for those dealing with the proving executor is far-reaching, and a purchaser especially seems to get an unimpeachable title even if the testator turns out not to be dead and the will therefore never to have come into operation.[56] The only possible danger that may then exist is that the probate may have been revoked before[57] the act or

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52 Including the anomalous "executor" appointed by the court under the Administration of Justice Act 1985, s. 50; see para. 1.8 (and n. 6) above.

53 See W., M. & S., pp. 428-9.

54 See W., M. & S., pp. 85-92.

55 Under Stamp Act 1815, s. 37.

56 A.E.A., ss. 8, 27 and 37; L.P.A., s. 204.

57 A.E.A., ss. 27 and 37, seems fully to protect in respect of subsequent revocation, but the wording in ss. 27(2) and 37(1) - "before the revocation" and "subsequent revocation" respectively - suggests no protection in the case of a preceding revocation. See Emmet, Vol. 1, para. 11.099 re the possible need to search in the Probate Registry.

transaction was effected and the grant not produced for it to be marked[58]: the textbooks are unsure whether a purchaser in good faith without notice will be protected.[59] It is difficult to gauge how substantial this risk may be: there must be few revoked grants that are unmarked in view of the grantee's duty to produce if he can, which means that in reality only a calculated fraud would be likely to constitute any danger. However remote the risk may be, it is a possible conveyancing "snag". If one left things as they are, purchasers would seem normally to have to make enquiry of the Probate Registry to ensure the grant of probate or administration had not been cancelled or revoked.[60] Presumably such an enquiry would have to be left till as near completion as possible, for although an unrevoked grant would have made the contract for sale valid, a later revocation would still mean the legal estate would not pass. An alternative would be to amend the law to establish that a purchaser relying in good faith on a revoked but unmarked grant would be protected. That could in turn, however, create a problem: a purchaser from a substituted personal representative might find himself robbed of land he had bought in good faith on the basis of a valid grant in favour of someone who had bought in equal good faith on the basis of a no longer valid grant. To counter that danger it might be possible to provide that a personal representative who had taken out a grant in place of a revoked unmarked one should somehow register the fact so as to protect possible purchasers under the former grant. This might be easier where title was registered: a caution or some other suitable entry could be made against the title. In unregistered conveyancing there might be the need to devise a new form of land charge, unless the new grant could

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58 See W., M. & S., p. 339, for a summary of the procedure.

59 See W., M. & S., p. 340; W. & C, Vol. 5., p. 44, re s. 27(1).

60 See Emmet, Vol. 1, para. 11.099 referring to an article by D.C.S. Phillips at (1982) 126 S.J. 107-8.

properly be entered under the Land Charges Act 1972 against the name of the former personal representative as a writ or order affecting land. We would welcome information on the extent of the risk and views on the suggested solutions.

2.16 Two sections of the Administration of Estates Act 1925 are crucial to the modern operation of executorships. Section 5 operates negatively. It provides for the total cessation of an executorship where (i) the executor dies after surviving the testator but before taking out probate, or (ii) he is cited to take out probate and does not appear, or (iii) he renounces probate. While valid acts done before those events remain good, once any of them occurs the legal position thenceforward will be as if he has never been executor. Thus, where he has died before probate, his own executor will not take over his executorship on a chain of representation.[61] Although a renouncing executor may be permitted to retract the renunciation, that retraction has no retrospective effect on acts and dealings since the renunciation and the probate granted on the retraction will be noted on the original grant.[62] Section 5 accordingly seems to generate no conveyancing problem.

2.17 The other section, which acts more positively, is section 8. This provides that where not all the executors named in the will take out probate, those that do may exercise all the powers of executorship without the participation of the non-proving executor or executors. In effect, this gives proving executors exclusive control of administration whether power to prove is reserved to non-provers or not. What, however, it does not do is to eliminate or even suspend the non-provers' executorship in the way that a renouncing executor's office ceases until

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61 This is also made explicit in s. 7(1).

62 A.E.A., s. 6.

retraction is permitted. This suggests that ownership of land remains vested in all the executors, although only the proving ones can in fact deal with it: so far as land is concerned no executor can effect a transaction without the co-operation of his proving co-executor or co-executors.[63] In any case the chances of a non-prover attempting to act in any way when another or others have taken out representation must be extremely slim. If there is any conveyancing risk at all, it would seem to be that where a notice has to be served on all the owners of land (for instance, notices exercising options) such a notice to merely proving executors might technically be invalid. Section 15 of the Act does not appear to help because it precludes activity by an executor while a grant of administration is in force and section 55(1)(i) defines administration so as not to include probate, only letters of administration.[64] Accordingly a literal construction of section 8 and other provisions in the Act would not seem to preclude this danger as to invalidity of notices. To counter such a danger section 8 would appear to require a widening amendment or a supplementary provision: this would provide that until a double probate[65] is taken out, there should be an explicit statutory cessation or suspension of the executorship. It would be helpful to know whether any difficulties of this nature have been encountered. It is possible that most often notices are served on existing agents and no one has thought of challenging such a notice. Whatever the position, views on the issue would be very welcome, especially since the requirements as to notices and their service are notoriously technical and the courts are seldom very predictably strict or lenient over such requirements.

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63 A.E.A., s. 2(2).

64 It would seem to be aimed at cases where special limited grants of administration, e.g. pendente lite or ad colligenda bona, are in force.

65 Viz. one by an executor proving later than an earlier grant.

Administrators

2.18 At first sight administratorship has few, if any, of these problems. There is no comparable "non-proving". Certain acts done by someone later taking out letters of administration can have legal consequences and even validity, even if normally only by a form of relation back.[66] Moreover, the grant of letters does have considerable retrospective force right back to the death of the deceased, but no form of ownership or legal control exists till the grant.[67] But some difficulties, if only theoretical, do exist.

2.19 Until an administrator is appointed the property of the deceased vests in the President of the Family Division.[68] Section 9 of the Administration of Estates Act 1925 specifies the case merely of intestacy, but it seems to be agreed that the vesting extends to any case where there is no executor.[69] This rather bold construction would need to be even bolder to cover a case where a sole executor survived the testator, but then renounced probate. If the expedient of vesting in the President is to remain, it would seem desirable to make the coverage expressly comprehensive.

2.20 The President as repository of title to the deceased's property is the latest officer to have this role. Originally[70] it was the bishop as "ordinary", but when probate jurisdiction was finally laicised the property devolved on the judge of the Court of Probate,[71] and then in the

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66 W., M. & S., pp. 90-2.

67 W., M. & S., pp. 428-31.

68 A.E.A., ss. 9 and 55(1)(xv), as amended.

69 W. & C., Vol. 5, pp. 24 (on s. 9) and 102 (on s. 55(1)(vi) - "Intestate") fairly categorically; W., M. & S., p. 211, much more guardedly.

70 See Statute of Westminster II, 1285, c. 19.

71 Court of Probate Act 1858, s. 19.

President of the Probate, Divorce and Admiralty Division in 1875, and today since 1970 in the President of the Family Division.[72] Section 9 provides that the property shall vest in him "in the same manner and to the same extent as formerly in the case of personal estate it vested in the ordinary". This, however, creates at least a theoretical, perhaps a real, difficulty. Whereas the ordinary will have always been a corporation sole with property vested in the holder as such, neither the probate judge nor the Presidents seem ever to have been such a corporation. This raises the question what happens to property vested in the President when he retires or dies. Unless "the same manner" and "the same extent" can be read to adapt some sort of corporation sole process to the President's succession, the various estates and interests will not pass with the office; and even pushing the analogy with the ordinary that far might strictly not help because it was only after 1925[73] that leaseholds passed to a "bishop's" successor on his death, so that before 1858 they passed to his personal representative. This would seem to be of little importance so far as the ultimate devolution is concerned: letters of administration are court orders which will take the property out of whoever has it and vest it in the representative and purchasers can rely on such an order.[74] However, if notices have to be served on the owner for the time being, a service on a current President might be void if the legal estate were still in his retired predecessor or in a predecessor's representative. The current Practice Direction[75] stipulates that notices to quit (and presumably, it is to be hoped, any other landlord and tenant or option notices) be served" c/o The Treasury Solicitor", but that of course would not affect the

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72 Administration of Justice Act 1970, s. 1, Sched. 2, para. 5, amending A.E.A., s. 55(1)(xv).

73 By L.P.A., s. 180: see W., M. & S., p. 471.

74 L.P.A., s. 204.

75 Issued 13 February 1985: [1985] 1 W.L.R. 310; [1985] 1 All E.R. 832.

essential validity. It is to be expected that the courts would strain to construe section 9 somehow to maintain succession, but to deter unmeritorious reliance on a technical anomaly, it would seem desirable to amend the section so that it should leave no doubt on this issue if the President is to continue as repository of title.

Registered land: devolution

2.21 The Land Registration Acts do not indicate where the legal estate rests when a sole registered proprietor has died. Despite the overall policy that the register shall be decisive on the location of that estate, Ruoff and Roper[76] accepts that the estate must be in someone and deduces that the same rules apply as in unregistered conveyancing - the executor, or in default the President, until an administrator is appointed. This conclusion rests on the assumption that the principle of the pre-existing land law that abhors a lapse in seisin must apply. Whether that principle has really been necessary since the disappearance of feudalism is questionable - so long, of course, as there is someone answerable for all legal purposes. As it is, the Acts contemplate and permit the continuance of the deceased's name on the register throughout the administration with the representatives exercising full proprietorial control and powers.[77] What is, of course, important, as already seen with respect to unregistered conveyancing, is that those who have to deal with "the owner" shall know easily and indisputably whom they must approach and give notices to. If uniformity were thought desirable, the law might be amended to have the legal estate vest in the Chief Land Registrar in all cases until the representative opted to have his own name inserted on the register or duly transferred or assented the title to another for him to be registered. This would save the party who had to give notice to the owner - or, here, "proprietor" - from having to discover whether there was

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76 R. & R., pp. 71, 662.

77 See L.R.A., ss. 37, 41.

an executor and who he might be. On the other hand, especially where periodic tenancies are involved, the tenant may quite properly be unaware whether the landlord's title is registered or not and, despite the spread of compulsory registration, that position may remain the case for many years to come. We favour the view that the same regime should continue to apply under both systems, but would be grateful for any views on the issue.

Notices generally

2.22 Although there has apparently been no reported litigation to establish that the various possible difficulties over the giving of notices are real-life ones, it seems to us that a more radical simple solution might be of help. It is conceivable, we suspect, that the reason for the apparent absence of any challenge to the validity of notices served following the death of the land-owner could be a combination of a lack of awareness of the problem and a typical British embarrassment in the face of death. Whether that is a valid explanation, there seems to be no doubt that the adviser of someone who needs to serve some notice, especially against a strict time-limit can find himself in awkward dilemmas. He may in a hurry have to discover whether there is a will, whether it appoints executors, whether they will act or renounce and who they are. In doing so, he risks the discovery that there is a later will (or a defect in the one he knows about). He must also discover whether there is a grant of administration made. Moreover, all this assumes he is aware of the death. Whatever the reason, diffidence, ignorance or whatever, it seems strange that no one has yet sought to challenge a notice for such a defect. Accordingly we tentatively suggest enactment of a double rule by which wherever an owner of land has died and service of a notice on him would have been valid had he still been alive, (i) service of a notice in his name to his last known address shall be valid if the server is unaware of the death; (ii) service of a notice with the designation "to the personal representative(s)" of the named deceased to the same address (with, perhaps, a copy sent to the Treasury Solicitor) shall be valid if the server is aware. We cannot see that this should in any way endanger the estate of the deceased, but we feel it would both simplify and render safer the

processes of the other party. It would be helpful to know whether difficulties of the general nature that have been envisaged here have been encountered in practice and whether the suggested solution would find favour with practitioners and others.

Death during sale

2.23 A seemingly straightforward conveyancing transaction can run into very severe problems if a party dies at a crucial time. We know that such occasions do occur, but not how frequently; the massive numbers of transactions each year would suggest that statistically the occasions cannot be that rare. It does seem to be the type of occasion that leads to the greatest number of requests to the Probate Registry for expedited grants. The problems are compounded by the fact that none of the conveyancing and succession textbooks seem to allude to the problem at all, other than to make clear that the contractual liability of the deceased will pass to the representative.[78] The problems differ somewhat according as the deceased was vendor or purchaser. However, it must be remembered that if the deceased was in the middle of a conveyancing chain, he will have been vendor in one link and purchaser in another. Moreover, the time of the death may make all the difference: if it occurs soon after exchange of contracts, or at any rate sufficiently long before the date set for completion, there will very often be time for an efficient conveyancer to have the necessary grant of representation taken out to effect completion on time. The nearer, however, the death occurs to the completion date the more acute the problems, and these will be problems that are likely to affect all the various parties locked in the chain. For all those concerned there is need for processes to exist in the law whereby completion can be effected on the stipulated date or with the minimum possible delay thereafter. It seems possible that existing processes may not fall far short of the ideal if, as they appear normally to be, they are conducted with sense and expedition by those involved. The greater

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78 See, e.g., W., M. & S., p. 433; Emmet, Vol. 1, paras. 6.026-6.029.

difficulties would seem to be ignorance even among conveyancers how those processes can work and a number of unfortunate uncertainties in the law.

2.24 The first major uncertainty is this: if the death has occurred so close to the contractual completion date that it is not practically possible to complete on time, how, if at all, is the contract affected? Clearly there is no frustration of the contract, but is the non-completion a breach of the contract or is the completion date postponed to the first date when completion will be practically possible? Analogies with illnesses of performers affecting continuing contracts of employment may or may not be proximate enough to be helpful. Then again, does it make a difference if under the contract time for completion is of the essence? And if there is some exculpatory suspension of the dead man's contractual duty, what of the position of the other parties in the chain? - If A is to buy B's land with the help of the purchase price A is to get from C and C dies, can A plead the same suspension as C's estate may, or must he go out and seek to borrow the shortfall at whatever cost? Before Raineri v. Miles[79] parties might have been unalerted to the damages implications where time was not of the essence. Suppose now, however, that a party in a chain (A) suffers the same sort of loss and distress which the Raineris underwent[80] but because another party (B) has died. If B is A's vendor,

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79 [1981] A.C. 1050. In that case A agreed to sell a house to B, who agreed to sell their house to C. In each case the date set for completion in the contract was 12 July 1977 and in neither case was time of the essence. A notified B of inability to complete on 12 July only on 11 July. C had already vacated his house in a distant part of the country along with his family and furniture and could not be contacted in time. B could not move to A's house, so C was forced to find temporary accommodation for himself, his family and his furniture. C succeeded in obtaining damages from B for breach of contract and B in obtaining recoupment from A for breach of their contract.

80 Viz. storage and hotel accommodation costs because they had set out on removal before notification could be given of the need to postpone.

"suspension" if applicable could mean that A has no redress, but if it is C who is A's vendor and he cannot move because B is his vendor and has died, then on Raineri v. Miles principles it seems likely that the unfortunate C will have to compensate A, but have no redress himself. Again, if time were of the essence or had been in effect made so by a notice to complete, could there still be a right to rescind without perhaps any right to damages? This speculation has probably now been sufficient to demonstrate the dimensions of the problems without the need to contemplate an ultimate in horror stories - death in the middle of a chain where time was of the essence in some but not all the sales.

2.25 At first sight the textbooks might suggest that the chances of a Raineri v. Miles dilemma should in practice be much diminished if it is a dead vendor that causes the difficulty, although probably not if it is a dead purchaser. Most completions involve the vendor's having executed the conveyance a day or two beforehand, and so, it would be said, either there will be an escrow that will be perfected as a deed despite the death or the death will have occurred before that execution in escrow and so in time for notification to be sent to prevent the abortive setting off and removal the Raineris underwent. But that assumes both that the doctrine of escrows applies to a vendor's pre-execution and that, if it does, the dead man's escrow will be effective at completion.[81]

2.26 It appears that since an agent (here the vendor's conveyancer) cannot "deliver" a deed for his principal unless he has been given a power of attorney to do so and since the document executed in advance cannot thinkably be either a nullity or an unconditional deed, that document must

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81 The recommendations in our Report on Deeds and Escrows would, if enacted, make it unlikely that a deed would be delivered in escrow before completion, as delivery would normally be by the solicitor or licensed conveyancer at completion. See (1987) Law Com. No. 163, paras. 2.11 and 3.5.

be delivered in escrow, the condition being the payment of the purchase price and the other rituals of completion.[82] Now if that is the true analysis, the argument proceeds that because the fulfilment of the condition of an escrow operates retrospectively, the vendor's death does not destroy the deed's validity once completion occurs.[83] In contrast, if the operation is not retrospective the deed is the executant's deed only when the condition is fulfilled and if he is then dead the deed would seem to be a nullity. However, if the operation is retrospective as argued, the deed would, at least in theory, be saved but all sorts of havoc could be wreaked. If, for instance, as regularly occurs, a vendor executes two or three days before "completion" and the deed operates retrospectively to pass the legal estate the day he executes (not as at completion), this will run counter to both parties' clear intentions, not to mention those of any mortgagees, as to date of operation. With a lease there may be less difficulty, because a lease theoretically (though rarely in practice, we suspect) can be lawfully executed before the term granted actually commences.[84] However, a freehold cannot at law be granted other than immediately.[85] One has only to think of the various registration, stamp duty and other timetables and of the likely reactions of mortgagees to realise that no analysis of a grantor's pre-completion execution satisfactorily fits both the case law and the intentions of the parties, or for that matter the commonsense of the position. It is true that in Lyme Valley Squash Club Ltd. v. Newcastle under Lyme Borough Council[86]

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82 J.T. Farrand, Contract and Conveyance 4th ed., (1983), pp. 322-8. See also our Working Paper (1985) No. 93, Formalities for Deeds and Escrows, pp. 8-11.

83 See also W., M. & S., p. 458.

84 Indeed any length of time up to 21 years: see L.P.A., s. 149(3).

85 See M. & W., p. 128.

86 [1985] 2 All E.R. 405, at p. 413 a, b.

Blackett-Ord V.-C. held the operation of an escrow not to be retrospective, but he appears to have reached this decision per incuriam of the Court of Appeal decision in Alan Estates Ltd. v. W.G. Stores Ltd.[87] and in reliance on a passage in the fourth edition of Megarry and Wade[88] (which was amended in the light of the Alan Estates case in the fifth edition[89]) which was published just about the date the Lyme Valley judgment was delivered. Of course, if Lyme Valley is correct, death before completion could be fatal to the deed's validity, whereas if the traditional doctrine of retrospectivity is correct the deed should be saved in such an event, but the whole process of completing a conveyance on sale is made a nonsense.

2.27 All this is merely one aspect of the inconvenience of the rule that precludes an agent not holding a power of attorney to that effect from dating and delivering at completion his principal's otherwise pre-executed deed. It would be unsafe to rely on the possibility that the special source of law, the custom of conveyancers, may have somehow amended this precluding rule in this one context. It is true that if litigation ever arose the courts might be able to achieve fair and sensible results in at least some cases by use of the doctrine of estoppel, but that possibility could not properly be regarded as safely settling the issues involved. On the wider issue of conveyancing practice on completion, legislation authorising effective dating and delivering by a conveyancer for his principal without the need for a power of attorney would seem to be desirable.[90] However, whatever the present or future position on that

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87 [1982] Ch. 511.

88 At p. 601.

89 At p. 158.

90 As recommended in our Report on Deeds and Escrows (1987), Law Com. No. 163, para. 2.11.

wider issue, it seems fair to say that no conveyancer could be properly advised or expected to rely on a deed pre-executed by a deceased - at least, not unless it were backed up by a confirmatory deed executed by his personal representative as soon as he had obtained a grant.

2.28 What seems to happen in practice is that the conveyancer acting for the deceased quickly notifies the deceased's vendor and/or purchaser of the death and the news travels along the chain. Whatever chagrin there may be, even perhaps where time has been of the essence, the parties all agree to postpone completions till a grant is taken out and matters can proceed. (An alternative sometimes taken, but with much trepidation and obvious risks, is to go ahead with moves and payments of price, leaving the documentation to be achieved later.) Once again the major motive may well be a reluctance to push rights, especially where those rights are anyhow uncertain in extent and strength, in the face of a bereavement. Whether from superstition, self-esteem or just better nature, even the toughest of bargain-drivers seems to shy away from litigation in such a context and, no doubt, the lawyers have no greater enthusiasm. Moreover, the ignorance of the processes whereby a grant may be quite amazingly expedited may induce the refrainers not to press the conveyancer for the deceased to achieve the fastest outcome, but to accept any excuses for delay stoically. This refraining is very commendable and not to be discouraged, but at the same time the law and its processes should be such that the sufferings and losses of all the parties in whatever chain there may be should be reduced to a minimum.

2.29 The first steps that are normally taken are to discover whether there is an extant valid will, whether it appoints executors, whether such executors are alive and readily contactable and whether they are willing to act. At this later stage a conflict of interest is possible: a willing executor will be a great boon to the conveyancer here, but if he acts at all he may find he may lose his chance to renounce probate in circumstances where it may be wiser for him to do so. If there is an executor willing to act he can in law effectively execute the

necessary deeds before getting probate,[91] but not only does he run risks in doing so, it will also be a most imprudent purchaser and an unimaginable mortgagee that would accept the dangers involved.[92] Accordingly, whether there is an executor or not, some form of grant will have to be taken out to enable completion to be effected.

2.30 The next major hurdle turns out to be quite easily surmountable. Probate cannot be issued within seven days of the death and letters of administration not within fourteen days.[93] However, the rule allows an exception in case of emergency with leave of two registrars. That leave will be given only where some hardship will result.[94] It is not clear how far hardship suffered by a third party such as another member of a conveyancing chain will suffice: understandably registrars are primarily concerned with those who have a direct interest in the estate whether as creditors or as beneficiaries. However, especially if there is a chance that damages may be available for failure to complete either on the set date or as soon as possible thereafter, it is thought that leave will not normally be withheld. Moreover, we understand that the Probate Registry will always assist with extremely quick responses and advice and has a tradition of moving very fast when needed and with the minimum formality that the law allows. Accordingly any delay that may be involved is usually to be found either in the understandable unpreparedness of the lawyer's office or in the working of the postal system. We also understand that the Capital Taxes Office is similarly helpful and expeditious in such cases. All in all, as

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91 See para. 2.15 above.

92 Ibid.

93 N.-C.P.R., r. 5(3).

94 T. & C., pp. 23-4.

matters stand now, with the appropriate minimum documentation being supplied, an expedited application could be dealt with in a matter of hours rather than days.

2.31 That said, the next major question is, what species of grant is the appropriate one. Even though the system does not necessarily require exact information on all details in an application for a full grant, it will take considerably longer in a normal case to obtain a full probate or letters than a specifically limited one. It is possible to obtain a grant limited just to the property to be sold[95] provided the estate is not known to be insolvent.[96] If the grant is made to someone entitled to a general grant, there has to be a special order.[97] However, it is also possible for someone not entitled to a grant under the normal priority rules to proceed under section 116 of the Supreme Court Act 1981, under which there is also power to limit the property subject to the grant. The limited grant would carry the full powers of a representative with respect to the property, so that it could be duly conveyed (even, one assumes, if it were clear that the deceased had sold for less than the best price reasonably obtainable - the binding contractual obligation would empower on its own). However, a limited grant of that nature would seem far less adaptable to the case of the deceased purchaser, where a purchase price must be raised and very often a mortgage executed. Much more fitted for that role is a grant of administration ad colligenda bona.[98] The purpose

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95 Under Supreme Court Act 1981, s. 113.

96 Unless the grant where there is known insolvency is confined to trust property in which the deceased had no beneficial interest: s. 113(2).

97 Under N-C.P.R., r. 50: see T. & C., pp. 372-3.

98 A limited or temporary grant made for the purpose of preserving the estate pending the grant of full probate or letters of administration. See T. & C., pp. 384-5, 552-3; W., M. & S., pp. 266-7.

of such grants is the preservation of the estate and it would seem that the satisfaction of an existing contractual obligation and the consequent avoidance of liability for breach and for costs in any litigation would come within that purpose. To that end also the representative's power to mortgage the land bought to help pay the price is probably implied in the grant, but there is no reason why such a power should not be specified in the grant to remove any shadow of doubt on the issue.

2.32 In fact, the grant ad colligenda bona is perhaps also possible - and preferable - in respect of a deceased vendor's liability. In this case it would be as well to have the power to convey in pursuance of the existing contract specified in the grant, because powers of sale are not generally implied into such a limited grant and it would be wise to put the matter beyond doubt. This form of grant in fact seems to be favoured by the Probate Registry over a grant limited to a particular property, because it is apparently much simpler to follow it up with a general probate or letters than it is with a limited grant. (Presumably there may sometimes also be added delay with a limited grant in identifying priority to take out the grant.) In all cases the registrars' powers to make the grants will be discretionary. Appeals can of course lie, but that is likely to be an academic issue because the essence of the exercise is speed. Once again, all the indications are that the registrars will continue to act helpfully, sympathetically and imaginatively, but it must still be borne in mind that they will see their duty primarily in the light of the good of the estate and of those interested in it.

2.33 This is an area where we regard it as especially desirable to receive information from those who have experienced the problems in practice and their views on how the present system works and whether it needs and can be given improvement; for instance, whether the need to get leave from two registrars for expedition of an immediate application has caused delay or difficulty and whether limited grants, and especially ones ad colligenda bona, have always proved speedy, useful and flexible. If there are any reservations felt about these and other aspects, it might

be best to devise specially tailored grants to carry out the sales and purchases of the deceased with specific streamlining of the process and with a clear recognition that the hardship of other parties in a chain will be as important a factor in the exercise of discretion as the interest of the estate itself. Our present view tends to be that where there is an existing contractual liability, the interest of a whole chain of purchasers should not be subordinated to any apparent benefit to the estate. On the other hand we also tend to think that such expedited procedures should not be automatic, but should remain subject to the satisfying of at least one registrar's discretion. We would also draw a sharp distinction between cases where the deceased was contractually bound and those where no formal exchange of contracts had occurred even if a price had been tentatively agreed "subject to contract". In the latter type of case there would have to be some very special factor that required an expedited procedure and it might well be wiser to leave it to the existing rules and processes. If the Conveyancing Standing Committee's proposals[99] relating to pre-contract deposit agreements are implemented, it would seem sensible to adopt any new expedited procedure also for cases where the new pre-contractual obligations would apply. In all cases, however, it needs always to be borne in mind that an institutional mortgagee's promise to supply a loan, though almost invariably honoured, is rarely, if ever, binding on it in law. Accordingly, if the desired conveyancing end is to be achieved, such mortgagees need to be satisfied of the efficiency and reliability of the process.

2.34 Even if the speediest possible process for getting a grant to complete a sale already exists or is achieved by some reforms of the type we have outlined, there could still remain the remote, but nonetheless distressing, risk of some sort of Raineri v. Miles loss and upset. As

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99 See Pre-Contract Deposits - A Practice Recommendation by the Conveyancing Standing Committee (1987).

already seen,[100] whether redress will be available to the sufferer and, if it will, who may then have to bear the cost of it, are uncertain questions, and questions that might require complicated and long-thought-out reforms of general contract law to solve. Such an exercise obviously lies well outside the remit of this paper. In the meantime it is not easy to think of an acceptable way of eliminating this risk by specific legislation. Any proposal would need to be very radically innovative, conferring an authority on somebody - presumably normally the deceased's conveyancer - to execute instruments and to effect completion in the name of the deceased. It is thought that such an authority would go well beyond anything yet achieved through the use of powers of attorney and would quite deliberately create a "dead man's agency" to the exclusion of the rights of the actual or potential personal representative. It is debatable whether such an authority, if it is to be given at all, should be (a) conferred absolutely to cover all transactions relating to land where a party might die before completion; or (b) implied unless excluded; or (c) be made capable of being expressly adopted. Because of the nature of the extended agency it would appear necessary to effect the changes by legislation. Whether such a radical change, with consequences it may not be easy to gauge in advance, is justified in the light of the seeming remoteness of the Raineri v. Miles type of risk is also highly arguable.[101]

2.35 We would warmly welcome expressions of view on this whole issue, which we suspect is the cause for considerable individualised worry, upset and frustration, no easier to bear because the actual problems are difficult to identify and gauge and thus rarely, if ever, attract attention.

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100 See para. 2.24 above.

101 A suggestion that this type of risk might be usefully covered by insurance is canvassed in an article by Professor Prichard submitted for publication in the Conveyancer.

Settled land

2.36 Whereas other trusts of land are integrated into the general pattern of devolution on death so that the land vests in the ordinary "general" personal representatives, settled land has its own special regime. Settled land is of course a unique system in that the legal estate is not normally vested in the trustees of the settlement but, wherever possible, in the adult beneficiary or beneficiaries for the time being entitled in equity behind the statutory curtain. Identifying such estate owners requires the reading of the trust instrument or will that grants the beneficial interests, although, so far as purchasers are concerned, the recording of the result of that process of identification in a vesting or other instrument operating in front of the curtain is to be taken as sufficient and reliable evidence of its own correctness.[102] Estate owners who are such beneficiaries are generally designated "tenants for life" whatever the exact nature of their beneficial interest,[103] while in the absence of such a tenant for life there will be a "statutory owner" who will most often be the current trustee (or trustees) of the settlement.[104] The trustees of the settlement do not in that capacity hold any interest in the settled land, although they may of course at the same time be statutory owners, special personal representatives or beneficiaries. The transmission of the office of trustee of the settlement with its main function of receipt and holding of any capital monies arising is governed by the general law of trusts, and in particular by the provisions of the Trustee Act 1925.[105] The estate owner of the settled land is himself a trustee of the land and of his powers,[106] but the general rules

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102 By virtue of presumptions in, e.g., S.L.A., s. 110.

103 See S.L.A., ss. 19, 20.

104 See S.L.A., s. 23.

105 Especially, ss. 34-9.

106 S.L.A., s. 107.

of transmission of office cannot apply to him because while the settlement lasts it will be the beneficial interests that dictate the identity of the estate owner. When one of a number of such estate owners dies, the estate will normally remain vested exclusively in the surviving estate owner or owners as with all co-owners and trustees, but if the sole estate owner dies or ceases to be entitled, special processes are needed. The conveyancing consequences of the death of a sole estate owner where land is settled can usefully be considered in the traditional three stages of treatment: (i) where the settlement arises only out of the will of the deceased so that the land is not truly settled till the deceased's estate has been administered; (ii) where the land remains settled after the estate owner's death; and (iii) where it ceases to be settled on that death.

Land settled by the will[107]

2.37 In this case the land will form part of the testator's general estate and will pass to his general representatives, who will in due course execute the necessary vesting instrument. This is so regardless of the testator's species of estate ownership when he died: so long as the settlement, whether called re-settlement or not, is an integrally new one, the devolution is via the general representatives even if the testator had been a settled land estate owner till he died. (If, however, the will effects merely a derivative settlement[108] within a continuing overall one, the devolution is through the trustees of the first settlement as special representatives of the testator.) No conveyancing problems seem to have emerged in respect of this type of devolution of the land.

Land remaining settled

2.38 The policy of the legislation is that wherever there are

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107 A strict settlement cannot, of course, now arise from an intestacy - there will always be a statutory trust for sale: A.E.A., s. 33.

108 See Emmet, Vol. 2, para. 22.028.

trustees of the settlement[109] they shall be the special representatives to deal with any administration with respect to the settled land and then to vest it in the next estate owner under the Settled Land Act. Only if there are no such trustees extant will the general representatives of the deceased estate owner be entitled to a grant to the land. This policy is achieved in part by a curious phenomenon - a power without option. If the deceased estate owner leaves a will, he is deemed to have appointed the trustees as special executors and if he has attempted to appoint someone else as such he is still deemed to have appointed the trustees.[110] If there are no trustees at the death but some are appointed later, they are entitled to special letters of administration with the will annexed, while if the estate owner died intestate the trustees, whenever appointed, can take out special letters of administration.[111] These special grants are a species of limited grant - "limited to the settled land". If the deceased was estate owner under more than one settlement with different trustees, each set of trustees takes out a special grant limited to the settled land under the specified settlement.[112] Where there is a special grant, the deceased's general representatives take out a grant "save and except settled land".[113] Where the same persons are entitled to both a special and a general grant, they may take out one grant expressly including settled land.[114] Special representatives have powers of disposition of the settled land entirely independent of the general representatives, who similarly have independent powers over the rest of the estate.[115] Whether

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109 As identified by S.L.A., s. 30.

110 A.E.A, s. 22(1).

111 N-C.P.R., r. 28(3).

112 See T. & C., p. 324.

113 N-C.P.R., r. 28(5): see T. & C., p. 320.

114 N-C.P.R., r. 28(4): see T. & C., pp. 324-6.

115 A.E.A., s. 24.

or not all this rather technical special machinery is strictly needed - trusts for sale survive without it - there does not seem to have been any conveyancing difficulty arising from it.

Land ceasing to be settled

2.39 Here the process is that the deceased's general representatives take out a general grant without any exception of settled land and deal with the land according to whatever trusts or interests now affect it. This position was established in the classic decision of Re Bridgett and Hayes' Contract.[116] This once very controversial decision construed section 22 of the Administration of Estates Act 1925 as applying only where land continued to be settled and also held that in any event a purchaser can rely on the accuracy of an unexcepted grant because it is a court order.[117] The decision has the great merit of not treating land that has in reality ceased to be settled land as still settled land and so it avoids an unnecessary statutory fiction. It has been much relied upon since 1928 without apparently any recorded instance of upset as a result.

2.40 One at least theoretical conveyancing problem does, however, arise in this context. This presupposes that the deceased was estate owner of properties held under different strict settlements one or more but not all of which ceased at his death. In that case it would seem that the trustees of the continuing settlement[118] would take out a special grant, but that would mean that the general representatives would take out a grant that excepted settled land. In that case a purchaser of land that had ceased to be settled on the death could not rely on the grant as conclusive that it had so ceased and would have to investigate the

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116 [1928] Ch. 163.

117 See L.P.A., s. 204.

118 Or settlements.

equities.[119] If this is a real problem, it seems to us that the probate rules should be amended to provide that in such a case the general grant should expressly exclude only land held under the specified continuing settlement. Information on how real the problem may be and views on its solution would be very welcome, along with any insights on any other difficulties that have emerged in practice over the devolution of settled land on death.

2.41 Another query that has arisen that might cause problems for a conveyancer is the suggestion that both a special personal representative and a general one who takes from a deceased tenant for life or statutory owner under the Re Bridgett principle have very restricted powers of sale or mortgage and a purchaser from him may not have the statutory protections.[120] The forcefulness of this suggestion has led leading textbooks[121] to sound such cautious notes as to induce intending purchasers either to insist on evidence that the transaction is in effect aimed at paying tax due (or some other purpose of the very limited administration that can apply) or to take the sale from an assentee from the representative. The first course runs counter to the whole policy of the modern law, while the second involves extra documentation with little or no extra safeguard for beneficiaries' interests. Again, the 1925 legislation has gone to great lengths to protect purchasers from personal representatives,[122] so the force of argument is strong both ways. We consider this to be most unsatisfactory and that the issue should be solved

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119 P. & C., p. 171, well describes the dilemma: see also M. & W., p. 338.

120 See Sir Lancelot Elphinstone, "Sale by the Executor of a Tenant for Life of Settled Land", (1959) 23 Conv. (N.S.) 360, (1960) 24 Conv. (N.S.) 43, 314.

121 See, e.g. Emmet, Vol. 2, para. 22.070.

122 See, e.g., S.L.A., s. 110(3); T.A., ss. 14, 17; A.E.A. ss. 24, 36(8), 39.

legislatively one way or the other. As at present we tend to favour enactment of a provision that ensures that such a representative has the same powers of disposition as any other representative so far as any purchaser may be concerned. Views will again be very welcome.

Other limited grants

2.42 There are of course a considerable number of other grants that can be made that are limited in either duration or coverage.[123] There are also more comprehensive grants - de bonis non and cessate grants - to meet the cases where the preceding grant has ceased or has not completed the administration.[124] By and large these various grants seem to pose little problem for conveyancers. They carry on their face the limitations on their operation and the Probate Registry's practices seem well adapted to ensure that markings and notations and other devices will alert practitioners to the interaction and replacement of grants. Moreover, it would appear that most of these grants carry with them the full powers of disposition that a normal general representative would hold.[125] Some, however, seem not to do so. The fact that a grant ad colligenda bona does not appear to import a general power of sale and mortgaging because it is aimed at merely preserving the estate temporarily, has already been mentioned;[126] as also has been the desirability of seeking the specification of such extra powers in the grant if a sale is contemplated. It seems also that grants pendente lite,[127]

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123 See W., M. & S., pp. 248-71; T. & C., pp. 333-85.

124 See W., M. & S., pp. 272-6; T. & C., pp. 409-25.

125 Especially under A.E.A., s. 39.

126 See para. 2.32 above.

127 Grants of administration limited to the continuance of the litigation after a probate action has begun.

while probably conferring full powers of sale and mortgaging, do not confer powers to make assents or otherwise to distribute.[128] We should be grateful to learn if any problems have been encountered by conveyancers by any shortfall in powers of disposition or any other feature of these limited grants.

Co-ownership

2.43 Modern English co-ownership of land is built on the concept of the trust for sale. On death of a legal co-owner (who has to be a joint tenant since 1925) his surviving co-owner or co-owners take by the jus accrescendi (right of survivorship). If co-ownership remains in existence, then there must be at least two trustees (unless the sole one is a trust corporation) before any disposition involving capital money can be effected. If co-ownership has ceased and the sole survivor is beneficially entitled, the position will differ according as the title is registered or unregistered. It will also differ according as the beneficial entitlement in the sole survivor has come about by the operation of the jus accrescendi on the end of a beneficial joint tenancy or by the inheritance of the undivided beneficial share of the deceased by his surviving co-tenant in common. If the title is registered and there was a beneficial joint tenancy before the death, there should be no restriction relating to the co-ownership on the register and the Registrar will merely delete the deceased's name from the proprietorship register, leaving the survivor as unrestricted sole proprietor, unless the Registrar has reason to believe that a severance of the joint tenancy had occurred by or at the date of death. If the title is registered and there was a restriction on the register at death because the co-owners were not then joint owners, the Registrar will need to have evidence of the vesting in the survivor of the whole beneficial interest before he removes the restriction from the register. If the title is unregistered and the co-owners appeared as beneficial joint tenants on the title deeds at the death, then the Law of Property (Joint

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128 See W., M. & S., p. 269.

Tenants) Act 1964 seems to provide purchasers from the survivor with full protection so long as the provisions of that Act are fulfilled. If, however, the title is unregistered and the 1964 Act does not apply, the survivor will either have to appoint a new trustee to act with him or (uniquely if the transaction is one such as a sale at an under value which trustees do not have authority to make) show the passage to him of the deceased's equitable share by assent or assignment. Subject to possible alterations to this last process to be discussed later,[129] there does not appear to have been any conveyancing problem arising from these processes.[130]

Registered land: generally

2.44 Most of the considerations so far examined in this Part apply whether the land is registered or not. Whether the personal representative opts to be registered as proprietor or to leave the register in the deceased's name until he disposes of the land, the Land Registry will require the lodging of a grant or evidence of it. If he does opt to be registered himself, his name will appear on the register with the description of himself as executor or administrator as the case may be: the specification of the type of representative is apparently to ensure that on his own death the operation of the rules as to the chain of representation will not be overlooked.[131] In the case of at least some of the limited grants a restriction will be added: for instance, a grant durante minore aetate[132] will have a restriction against dispositions

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129 See para. 4.29 below.

130 Other problems that might have arisen from the implications of the Court of Appeal decision in City of London B.S. v. Flegg [1986] Ch. 605 appear largely to have been removed by the House of Lords decision in that case, reported at [1987] 2 W.L.R. 1266.

131 See R. & R., p. 161.

132 A grant made to a minor's guardian for the minor's use and benefit until he attains the age of 18.

after the named minor reaches eighteen years of age.[133] It is arguable that the designation as executor or administrator operates to notify anyone dealing with the land that the powers of disposition are those of that office, much in the manner of a true restriction, but we understand that the Land Registry would not agree with such a view. The implications of opting not to be registered will be considered in Part IV of this paper, where in substance the topic would seem properly to lie. Our impression is that the registered system works well so far as devolution to representatives is concerned.

Land charges

2.45 In the unregistered system there is a special problem which may not yet have engendered reported litigation, but has worried and perplexed practitioners[134] as well as writers.[135] It is one more example of the notorious difficulties springing from the use of a names basis for the land charges registration system. If a land-owner creates a land charge and dies before the chargee registers the charge under the Land Charges Act 1972, it is utterly uncertain whether any effective registration at all can then be made and, even if it can, against whose name registration should be made. The Act requires that the charge be registered "in the name of the estate owner whose estate is intended to be affected."[136] The requirement is notoriously strictly applied.[137] It is in the first place unclear whether the "to be affected" refers to the charge

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133 See R. & R., p. 675.

134 See, most recently, a letter from R. Rose in Postbox in [1986] L.S. Gaz. 1851-2.

135 See Emmet, Vol. 1, para. 19.003; A.M. Prichard, "Land Charges and the Dead Man's Handle", [1979] Conv. 249.

136 S. 3(1).

137 See, e.g., Barrett v. Hilton Developments Ltd. [1975] Ch. 237; Diligent Finance Co. Ltd. v. Alleyne (1971) 23 P. & C.R. 346.

or to the registration. A dead man ceases to be estate owner, of course. In the absence of specific case law it is possible merely to speculate generally, but that does not help either chargee or potential searcher. The chargee may often be unaware of the death of the estate owner, and so register promptly and fully against that name. On the other hand, if the registration is delayed, a searcher might restrict his search to a period ending not long after the death and miss the entry. If the death is known, then similar problems to those discussed with respect to notices[138] will occur. The existence or not of executors and their full names must be discovered, although presumably a registration if it would otherwise be valid, will not fail just for a later failure to take out probate or renunciation; but it would if the will turned out to be invalid. If there were no executors and no grant yet to administrators, registration against the President of the Family Division would seem called for, but since he is not a corporation sole, it may be that the registration will need to be against his name, not the designation of his office. All this makes nightmares for the searcher. Does he have to discover the names of all non-proving executors and consult the records for the dates of incumbency of the Presidency? The biggest puzzle is perhaps why there has not yet been litigation.

2.46 It follows that legislation is needed to clear up this mess. No solution is obvious or totally satisfactory. Whatever is done needs to be fair to chargee and searcher alike and to minimise the inconvenience for each. We tend to favour an addition to section 3(1) of the 1972 Act to make effective registration against the name of the deceased even after his death, but we wonder whether there should also be a proviso that such registration should be effective only if made within a fixed period from the death. This would, perhaps, be fairer for the searcher and a reasonable spur to chargees to act promptly. If so, we would suggest the period be twelve months, but we can also see the arbitrary nature of any

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138 See paras. 2.17 and 2.20-2.22 above.

such time limit and the consequent argument that there should be no time limit. In either case, we would incline towards providing that registration be precluded against the names of the representatives or the President where the charge came into existence in the deceased's lifetime. These suggestions are very tentative and we would be very grateful to receive views and alternative suggestions on a very knotty problem.

Devolution of leasehold land

2.47 A final matter that can usefully be raised here is perhaps more accurately classified as a land law or administration issue rather than as strictly conveyancing. This is the possible difficulties that may arise for personal representatives from the operation of the doctrine of privity of estate where leasehold land devolves to them.[139] Those representatives will be the tenants and liable as such until sale or assent, and where the covenants are onerous and the estate only modest, their rights of indemnity may prove decidedly inadequate. We understand that this consideration may have induced otherwise willing representatives to renounce probate or not to seek a grant. If that is the case, a solution might be to exempt representatives from personal liability to the landlord, at least while acting within their lawful authority. In such a case the estate itself would bear the direct liability. Conceivably such a result might be achieved without taking the legal estate out of the representative, though such an estate would in the event be largely a mere legal "shell". We would welcome any evidence of the extent of this problem and any views on how it might be solved.

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139 See Privity of Contract and Estate (1986), Working Paper No. 95, in particular para. 2.15.

PART III

DEVOLUTION DURING ADMINISTRATION

3.1 At the outset an important conceptual distinction should be drawn. Personal representatives hold property for the sole function of administration and, as already seen, that function consists of the collection of the assets, the settling of the debts and the distribution of the remaining assets. Their duties and powers are directed towards and confined to that composite function: administration is the sole basis of their authority and once it is complete that authority and the powers depending on it should cease.[1] Now if the law offered no aids to the

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1 Note that personal representatives may become trustees. After outlining certain distinctions between administration and trusts, Snell's Equity 28th ed., pp. 100-1, continues (footnotes omitted):

> Despite distinctions such as these, the dividing line between trustees and personal representatives often tends to become somewhat blurred, so that a person may at the same time be both a trustee and a personal representative. A will may set up certain trusts and appoint the same persons to be both executors and trustees; and once appointed, a personal representative remains a personal representative for the rest of his life unless the grant is limited or is revoked by the court. Further, on an intestacy the personal representatives are constituted express trustees.
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> It follows that no general test can be laid down; the distinction can be drawn only quoad the particular assets in question. If the personal representatives have no duties to perform beyond the collection of assets, payment of creditors and distribution of the estate, they will remain personal representatives (even if they have stated that they are trustees) until assenting, or, if the legatees are infants, until availing themselves of the power to appoint trustees of the gifts to the infants. This will be so even where the payment of the legacy is postponed. But where they are directed to hold the estate or some part of it upon certain trusts (e.g. for persons in succession or upon trust for sale and division) they will become trustees when the administration is complete, though in the case of land not, it has been held, until they sign a written assent in their own favour. The moment of transition from administration to trusteeship depends on the circumstances, although when the personal representatives bring in their residuary accounts, or exercise a power of appropriation, there is a presumption that the trusteeship has begun. The mere existence of an outstanding mortgage does not prevent the residue from being ascertained.

purchaser from the representatives, that purchaser would have to satisfy himself that the administration was still in progress, that the disposition was one in the course of administration and that the proceeds of the transaction were being actually employed to that end. However, to simplify and expedite conveyancing the purchaser has been accorded a statutory curtain that shields him from needing to investigate any of those factors which constitute the representative's authority. Whenever the law - and especially the 1925 legislation - gives and imposes a curtain, there is generated a distinction between the reality and the evidence, especially documentary evidence, of the reality. So with settled land there are the concepts and consequent separate time planes of being subject to a settlement and being subject to a vesting deed.[2] With trusts for sale the curtain is inconveniently incomplete because there is no provision for documentation to evidence the end of the trust where the land has been retained, not sold.[3] In respect of administration the curtain is an extensive one, so that for the benefit of a purchaser there may be an assumption of the continuance of administration even though long since all assets have been collected, all debts paid and all beneficiaries begun enjoyment and possession of their entitlements. It means that this departure from reality will require documentation to evidence the end of the assumption for the benefit of purchasers. That has proved one of the major areas of difficulty in the law of devolution on death.

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2 See, e.g., S.L.A., ss. 2 and 3, in contrast with s. 18.

3 Other than the much-delayed Law of Property (Joint Tenants) Act 1964, which goes some way towards providing a curtain in the one trust for sale case of a beneficial joint tenancy. The whole topic is more fully discussed in the 23rd Report of the Law Reform Committee, (The Powers and Duties of Trustees) (1982), Cmnd. 8733, paras. 5.5-5.6 (and see recommendation no. 37). See also Trusts of Land (1986), Working Paper No. 94, para. 16.3.

3.2 Unlike the case with strict settlements, where an informal settlement may pre-exist the curtaining documentation,[4] the discrepancy between reality and the curtaining evidence in respect of administration seems normally only to occur where administration is really complete. For a number of reasons the legal appearance of a continuance of administration can last for years quite indefinitely. Sometimes it is because lay people have taken out representation themselves. On the other hand it seems often to happen even where lawyers are involved, sometimes by oversight, sometimes - as will be seen - by perfectly sensible design. Perhaps it is that the process of administration often has many strands, some of which are difficult to control and timetable, so that the bringing of the operation to a tidy conclusion is more easily overlooked or postponed than with a more unitary transaction. This will be all the more so when there is no continuing inconvenience to anyone in letting things run on and the lawyer's envisaging of later conveyancing problems is not sufficiently specific and insistent. As it is, the conveyancing difficulties that do occur seem more associated with the post-reality epoch than when administration is still being carried on in earnest.

3.3 Devolution during administration can happen in two main ways - (i) where the pre-existing grant has come to the end of its purpose but some administration still remains to be completed; (ii) where executor or administrator has died or been removed in course of administration before the natural end of the grant. In the former case the new grant has the extremely curious designation "cessate", which one might fairly have thought would better have described the pre-existing one.[5] In the second

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4 See especially S.L.A., ss. 9, 13 and 110(2).

5 See W., M. & S., pp. 275-6, which also covers a very specialised and probably rare form of grant to an attorney for the benefit of another.

case the grant that is taken out will be one of administration de bonis non.[6] There is, of course, no case for such a grant where devolution has occurred automatically from executor to his own executor under the chain of representation.[7] The chain is in fact, it seems, the one instance where a devolution can occur without a grant or order that refers to the first deceased and his estate. Even there, of course, there must be the probate of the original executor, so that in all cases a purchaser will always be able to refer to a grant or order (or a combination of grants or grants and orders) to assure himself of the vendor representative's authority and thus to have the protection of section 204 of the Law of Property Act 1925. As already seen,[8] practice in the probate registries will normally ensure so far as possible that any revocations and succeeding grants are made knowable to purchasers by the systems of markings and notations that are operated. With the possible exception of the suggestion that purchasers should be protected where reliance has been placed on a revoked grant which has escaped marking,[9] we are not aware of any other hazard to purchasers in the present system but would be interested to learn of any.

3.4 Two features of the law of administration of estates are striking: (i) the control of the court (or of the registry in its name) over the devolution of executorships and administratorships; and (ii) the reluctance of the law to allow a representative to rid himself of his office. In these respects there is probably the most marked difference from the position with respect to trustees: the latter play the dominant

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6 See para. 1.9 above. See also W., M. & S., pp. 272-4.

7 See para. 1.8. above.

8 See paras. 2.15 and 2.42 above.

9 Para. 2.15.

role in the passing on of their office[10] and in their retirement,[11] with only the rare need to apply to the court. Removal of an incapable representative requires either a revocation of a grant or a fresh replacement grant.[12] Those wishing to retire have, at least until recently, never found it easy to do so;[13] and it also seems that only very serious misconduct has been likely to secure removal by revocation.[14]

3.5 Very recently a possibly radical change has been instituted by legislation, but it is so recent that it is not yet possible to gauge how radically it will be applied and whether it goes far enough. The legislation is section 50 of the Administration of Justice Act 1985.[15] This enables application to be made by or on behalf of a personal representative or a beneficiary, but not a creditor, for the court (i) to appoint a substituted personal representative[16] in place of an existing one, and (ii) to terminate the appointment of one or more representatives so long as at least one representative remains in office.[17] The court is also given an unqualified discretion to authorise remuneration for a substituted representative.[18] This is the first general power to this

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10 See T.A., s. 36, especially.

11 T.A., s. 39.

12 See T. & C. pp. 456, 462-3.

13 See T. & C., p. 457.

14 See, e.g., In the Estate of Cope [1954] 1 W.L.R. 608; P. & C., p. 197; T. & C., p. 462.

15 See para. 1.8, n. 6 and 1.13, n. 12, above.

16 Called an "executor" or an "administrator" according as outlined in s. 50(2).

17 S. 50(1).

18 S. 50(3).

end that has been conferred on the courts, although there did and still does exist a rather little used jurisdiction under the Judicial Trustees Act 1896.[19] The 1985 Act effects a sensible interplay with the earlier statute.[20] No grounds for the exercise of the powers have been specified. Possible normal grounds would be (a) to allow for the removal of a recalcitrant, incompetent or dilatory representative; (b) to allow a representative to retire; (c) to allow an executor by representation to give up one or more of the executorships he has inherited through the chain without abandoning his office for the immediate deceased's estate. It will be important to see how liberally the powers are used in all these respects and also how readily applications will be made. Obviously an unsatisfactory or unwilling representative may sometimes cause delay and frustration in a conveyancing process. On the other hand, especially with estates of modest value, there may be an understandable reluctance to seek a court decision however streamlined and easy the process may turn out to be.

3.6 All this raises a wider policy issue that goes far beyond the boundaries of mere conveyancing, but could have significant effects in some conveyancing transactions. This issue is whether there is really the need for such close court control, and so whether there should not be a relaxation on the lines of the trust - even perhaps going further than that and taking the trust along. However, this is well beyond the remit of this paper and must await a fuller review of the general law of administration of estates.

3.7 In the meantime, it is necessary to consider the present position to see if conveyancing can be facilitated within that framework.

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19 See W., M. & S., pp. 21-2.

20 S. 50(4), (6).

As indicated, if the chain of representation does not apply for want of an executor somewhere en route, there must be an application for a grant - most often for administration de bonis non. Once again, it appears that there is a widespread lack of awareness of the speed with which the probate registries and the Capital Taxes Office can and do, very willingly, work. The turn-around need rarely take more than a week and, if haste is needed, the process can be got through in a day or so. Moreover, the official fees are extremely modest. Once again, however, the helpfulness and efficiency of the public departments are only part, and not the major part, of the story. The office of the practitioner handling the matter will have, sometimes quite suddenly, to gear itself for the application, and the cost and time of such preparation, even with the help of advice from the registries, will often be unavoidably much greater than that involved at the governmental end.

3.8 Where the "reality"[21] is that administration is still going on, it would seem that no conveyancing advantage should readily outweigh the public policy still in force, that the operations of each representative, other than one in a chain, should have their authority in a court order so as to safeguard the interests of all concerned. However, when the reality has evaporated, it may be fairly argued that the policy has gone too and nothing should impede the speed, smoothness, cheapness and safety of the conveyancing. Moreover, the taking out of a grant de bonis non or a cessate grant when there is still some collection of assets, payment of debts or realistic distribution of property to effect is not just a commonsense necessity under the present system: it is also most likely to involve no inordinate work because most often whoever has been dealing with the estate will have readily available the material upon which to prepare the application. The longer however since the reality has ceased, the more burdensome and time-consuming the effort, especially if the

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21 See paras. 3.1 and 3.2 above.

conveyancer requiring the grant for his client has never had to deal with the estate.

3.9 It is with this consideration in mind that we have approached the question of the curtain that has remained long after the substance of administration has ceased. Such a situation will moreover quite often not be the consequence of any neglect, but of sensible business decisions within the framework of the law. In many ways the machinery of the Administration of Estates Act is recognised as superior to those of the strict settlement and the trust for sale: there is much less technicality and the statutory provisions as a result appear to offer greater safety. Very often representatives will be advised perfectly properly not to assent expeditiously. One example will suffice. Ironically the majority of strict settlements created these days are by testators making home-made wills without expert advice: they leave life estates to spouses, children or other relatives and render the Settled Land Act inescapable. Sometimes the Settled Land Act machinery may be entirely appropriate and work satisfactorily, but often the estate owner whom the law designates for such a settlement will be elderly and understandably reluctant to have the legal estate vested in him: nor may the conveyancer be at all enthusiastic. Accordingly reliance will often be placed on the presumptions in favour of a purchaser buying from a representative[22] and the shell of representation be sustained. The debts are all paid and the beneficiaries all long since enjoying their bequests: only the legal estate remains outstanding and, in the nature of things, it tends to remain outstanding until something happens, such as a desire to sell or to raise a mortgage, and many years may well have elapsed. Re-opening the old estate of the deceased can then be a nightmare.

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22 Especially A.E.A., s. 36(8).

3.10 The Probate Rules themselves recognise this dichotomy of cases. In the forms of oaths required of an administrator de bonis non[23] the "reality" oath refers to the deceased representative dying "leaving part of the said estate unadministered", whereas if only the shell of the legal estate remains he is characterised as having died "without having completed the administration of the estate". For the sake of the law's reputation it is to be hoped that no one has ever sought to explain to a layman the linguistic basis of this distinction. An order of the court is being got, not for what it was designed - to authorise someone to administer - but to sustain a conveyancing curtain. A purchaser, of course, needs that curtain: otherwise he has exhaustively to investigate the history and rectitude of the administration and the location of the equities. It is in this sort of case where we wonder whether the policy of the 1925 legislation already discussed[24] allowing the making of suitable declarations a purchaser can rely upon, could not valuably be extended. The vendor's advisers will satisfy themselves of the facts, bearing in mind their and his liability if they fail to do so carefully, and will record the result of their finding in the appropriate document: the outstanding legal estate, long since a shell, will automatically vest where it should have done and there will be no need to rely on the notoriously intricate and unpredictable operation of the limitation laws when trust concepts are involved. The most notorious problem that might be solved in this way is that thrown up by Re King's Will Trusts,[25] which we shall be discussing in Part IV.[26] Meanwhile views on this overall approach will be welcome.

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23 N-C.P.R., Forms 179-86: see T. & C., pp. 1053-7.

24 See paras. 1.15-1.19 above.

25 [1964] Ch. 542.

26 See paras. 4.19-4.24 below.

Registered land

3.11 Our impression is that the issues raised in this Part III of our paper apply equally to registered as to unregistered land and that there are no extra problems generated by the system of registered conveyancing in this context. We would, however, of course be anxious to learn of any difficulties that may exist.

PART IV

DEVOLUTION TO PURCHASER AND BENEFICIARY

4.1 While the subject of passage of title from personal representatives, as it were out of administration, can be best divided into (a) dispositions in course of administration and (b) distributions, the picture is not totally tidy. For instance, any person to whom a testator gives an option to purchase property, especially at an undervalue, has characteristics of both a beneficiary and a purchaser. Similarly where an appropriation takes place. It may become important as a matter of title whether the "beneficiary" qualifies as a purchaser for value - or for money or money's worth. There appears to be no authority on whether such an acquisition, whether effected through a conveyance or an assent, will destroy an unregistered land charge,[1] will count as a purchase for value for the purposes of the Land Registration Act or will defeat an unregistrable equity where there is notice. It would be very useful to have information on whether any problems have arisen in practice, and also to have views on how best such acquisitions should be treated. It is thought that the one area where the question seems to have been the subject of reported litigation - stamp duty[2] - is not necessarily a suitable precedent for the very different policies of registration and notice. If the law is to be clarified, the line of any distinction will not be easy to draw. Distinguishing between options on the ground of the type of instrument or transaction (here a will) does not seem very satisfactory, but a line between an option to buy at an undervalue (especially when the will also gives the grantee of the option an additional legacy from which the option price might be paid) and an appropriation in satisfaction of a general legacy would be less satisfactory still. Then again a line between such an

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1 L.C.A., s. 4.

2 See e.g., Emmet, Vol. 2, para. 31.024.

appropriation and a specific legacy is no more convincing. The tidiest solution might be to exclude from the various definitions of purchaser any acquisition arising out of a provision in a will or out of an intestacy. If that is done for definitions of "purchaser" in respect of the land registration and land charges systems, it would seem sensible to provide similarly in respect of interests which appear to be capable of affecting purchasers under the operation of the old doctrines of notice (such as estoppel interests, interests arising under the principle of benefit and burden, and overreachable interests that have not been overreached under the due procedure).

Section A Dispositions During Administration

Sale

4.2 Personal representatives appear to have sufficiently wide powers of sale to cover all transactions they are likely to need to effect. Under the Administration of Estates Act 1925[3] they have both the full powers that trustees for sale of land have[4] and, in respect now of freeholds as well as leaseholds, the powers of sale that before 1926 representatives had with respect to leaseholds. We suspect that, as regards powers of sale at any rate, the two sets of powers may well be conterminous, and it is scarcely satisfactory that statute should still require reference to be made to pre-1926 law which may, moreover, have not been fully worked out and synthesised at that time. However, section 39(1) covers more than mere conveyancing powers and we feel its up-dating should await any wider overhaul of the law of administration. Like trustees for sale representatives also have powers of exchange,[5] but

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3 Ss. 2(1) and 39(1).

4 Under L.P.A., s. 28(1), which incorporates the widest powers of tenants for life, statutory owners and trustees of the settlement under the S.L.A.

5 Imported from S.L.A., s. 38(iii).

we suspect that representatives will not have had many occasions for exercising them. So far as the directly conferred statutory powers are concerned, there is a specific requirement that the sale or exchange must be for the best consideration reasonably obtainable, but that would be the case also for any sale by a representative or trustee.[6] There is even a duty to gazump if a better offer occurs before exchange of contracts.[7] Whether fiduciaries should be exempted from this necessity[8] is a wider issue than just sales by representatives, but views would be welcome.

4.3 An oddity in the 1925 legislation is that whereas the powers conferred by the Settled Land Act on its estate owners carry with them an express conclusive presumption that a purchaser in good faith shall be taken to have given the best consideration reasonably obtainable,[9] there is no such express presumption for either trustees for sale or personal representatives, and both provisions importing those powers[10] would have to be given the most strained and liberal constructions for it to be implied. If it was felt to be necessary in the case of settled land, where the estate owner is just as much a fiduciary,[11] it is difficult to see why it was not also accorded to the other two cases. Purchasers should in all cases have total freedom to haggle over the bargain made and not be assailable if a beneficiary can show a better price might have been obtained. Although the issue seems never to have come up in reported

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6 See, e.g., Snell, pp. 260-1.

7 See Buttle v. Saunders [1950] 2 All E.R. 193.

8 On the assumption that there is no change in general conveyancing practice.

9 S. 110(1).

10 L.P.A., s. 28(1); A.E.A., s. 39(1).

11 S.L.A., s. 107.

litigation, we would regard it as desirable to have statutory coverage extended from the Settled Land Act.

4.4 Unlike trustees[12] representatives are not affected by a rule that capital monies must always be paid to at least two unless the sole one is a trust corporation.[13] However, if there is more than one representative (not including a non-proving executor[14]) all must concur in a conveyance of land.[15] This rule which since 1925 applies to leaseholds (as well as to freeholds) does not apply to pure personalty including interests behind a trust for sale of land.[16] In view of the fact that most beneficial interests in co-owned land are technically interests in the proceeds of sale[17] and occasionally title to the legal estate in land will depend on the passage of such interests, we are inclined to wonder whether the law should not insist on the same regime for them as for land itself. Views would be welcomed.

4.5 Although land can be conveyed only with the participation of all the representatives, one (or fewer than all of them) can, it seems,

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12 See T.A., s. 14(2) and L.P.A., s. 27(2); and its counterpart for settled land, S.L.A., s. 18(1)(c).

13 See A.E.A., s. 2(1); L.P.A., s. 27(2); S.L.A., s. 18(2)(a).

14 A.E.A., ss. 2(2) and 8(1).

15 A.E.A., s. 2(2).

16 A.E.A., s. 3(1)(ii): the same is true of mortgage monies, though not the mortgaged land.

17 See Williams & Glyn's Bank Ltd. v. Boland [1981] A.C. 487 for the unreality of the rule. While the House of Lords was there especially referring to interests behind statutory trusts for sale, the fact that the choice of statutory or express trusts for co-ownership will often depend on the taste of the conveyancer would suggest that any co-ownership interest is perhaps better regarded as land.

make a binding contract to deal with the land without even attempting to allege agency from the remainder.[18] If he does allege an agency he does not have, the contract will not be enforceable as such, but an action on the warranty of authority will lie against him for damages. Without allegation of agency he can apparently make a binding contract for sale which the purchaser can specifically enforce. This may seem scarcely satisfactory in the light of the prescription that all must concur in the conveyance that completes the sale, although of course their concurrence will be forced by the court order. It is all the more unsatisfactory when it is appreciated that the lines between selling on one's own authority and on behalf of the estate and on behalf of all the representatives might depend on the subtlest of inferences. We are inclined to believe that contracts for disposition of land should be capable of being effectively made only by or on behalf of all the representatives. This would not exclude an actual (not ostensible) agency in one or more of them, but a purchaser would need to realise that if the agency does not exist, he will have merely his right to damages for breach of warranty of authority. Contracts for land should, we feel, be made in the names of all the representatives. Again views would be welcome.

4.6 It appears uncertain whether or not representatives have the extended powers of overreaching equitable interests conferred on certain trustees under the so-called ad hoc trust for sale.[19] The question turns on the construction of the puzzling word "effectual".[20] We should welcome

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18 See Fountain Forestry Ltd. v. Edwards [1975] Ch. 1; Emmet, Vol. 1, para. 11.086.

19 L.P.A., s. 2(2): see Emmet, Vol. 1, para. 11.085.

20 In A.E.A., s. 39(1)(ii).

information whether such extended powers have ever been felt to be needed for representatives.[21]

Purchase

4.7 It is difficult to gauge how often representatives may wish to buy land "for the estate". However, it is reasonable to suppose that occasions do occur, especially when representatives are sustaining administration during a minority or while a life estate subsists as expressly allowed,[22] where a house is to be bought as a home for a beneficiary, particularly if the pre-existing home has been sold. The imported powers[23] cover this transaction so long as the property is freehold or leasehold with at least sixty years of the term to run.[24] The major difficulty that can arise is if the purchase price needs to be made up with the help of a mortgage. This has been found to be not possible in respect of settled land and trusts for sale: there appears to be no power of mortgaging even the acquired land to help towards the purchase price. It is hard to see how such a mortgage would really be "for the purposes of administration". The mortgagee might just be able to rely on section 17 of the Trustee Act 1925, but, especially if he is a vendor leaving some of the price out on mortgage, there would appear to be a risk. We think that there is a strong case for unequivocally conferring such a power to mortgage on representatives with full protection to the mortgagee, and we are also inclined to believe that a similar provision to cover strict settlements and trusts for sale would be desirable.[25]

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21 Emmet seems to doubt it: ibid.

22 A.E.A., s. 39(1).

23 By A.E.A., s. 39(1)(ii) and (iii), from S.L.A., s. 73(1)(xi), via L.P.A., s. 28(1).

24 The representatives can take on a lease for a lesser period (as allowed by S.L.A., s. 53), but no capital money can be paid out for it.

25 See also Trusts of Land (1986), Working Paper No. 94, para. 3.26(i).

Other powers

4.8 For other purposes it would seem that representatives have ample powers of mortgaging to meet the needs of their functions, and, unlike trustees, they can charge by mere deposit of deeds.[26] They probably do not often require to lease land or to take leases (except where renewing existing leases), but they have the adequately wide settled land powers,[27] and the same is probably true of all the other powers vested in them. We should be grateful to hear of any problem that may have arisen in respect of such powers.

Protection for purchasers

4.9 In most respects, except as already specifically queried, the protection for purchasers seems comprehensive. The fact that notice that, in effect, all the acts of administration have been done does not invalidate a conveyance to a purchaser,[28] means that he can safely assume that the representative still holds the powers if he still holds the legal estate without there having been any documentary evidence of a change in his capacity. Moreover, the purchaser is exonerated from seeing that any money he has paid is properly applied so long as he gets a proper receipt from the representative;[29] nor does he have to check that the money is needed.[30] As already seen, he is also protected where the representative's grant is subsequently revoked,[31] although we have raised the question earlier whether he should not also be protected where he is not aware that a grant has already been revoked.[32] Moreover, a

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26 A.E.A., s. 39(1)(i).

27 S.L.A., ss. 41-8.

28 A.E.A., s. 36(8).

29 T.A., s. 14(1).

30 T.A., s. 17.

31 A.E.A., ss. 27(2) and 37.

32 See para. 2.15 above.

purchaser is protected where a representative is in breach of his duty not to sell a matrimonial home within twelve months of the taking out of representation.[33]

4.10 A purchaser from a representative also has a special protection. If the purchaser is one for money or money's worth,[34] a statement in writing by the representative[35] that he has not made any assent or conveyance of a legal estate is sufficient evidence that none has been made by him (or by a predecessor, it seems[36]) unless notice of the assent or conveyance has been endorsed on the representative's grant.[37] The provision goes on to work an unusual statutory deprivation and conveyance: the purchaser who relies on the statement will have the legal estate taken from the assentee[38] and vested in himself unless there has been such an endorsement. The protection is lost if the land has already been conveyed to a purchaser for money or money's worth. The provision has been vigorously attacked by The Law Society[39] and it is difficult to assess how useful and necessary it has been. It has, however, probably induced the profession to make endorsements and this has in turn probably eliminated many risks, although following up grants years later may, at least until the period of title investigation was reduced to fifteen years

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33 Under I.E.A, Sched. 2., para. 4(1): the protection is in para. 4(5).

34 See A.E.A., s. 36(11).

35 Perhaps even implied by a conveyancing "as personal representative": see W. & C., Vol. 5, p. 64.

36 See W. & C., ibid.; Emmet, Vol. 1, para. 11.118.

37 A.E.A., s. 36(6): the right to endorse is given by s. 36(5).

38 Or anyone else not acquiring for money or money's worth the land that had been assented or conveyed.

39 In its Second Memorandum on Conveyancing Reform, November 1966, paras. 20-30.

as from 1970,[40] have proved irksome and difficult as claimed by The Law Society. Probably also, purchasers from assentees have normally checked that there is an endorsement and insisted on its being made if not,[41] so that clashes between purchasers may well exist only in academic speculation. In registered conveyancing there seems no need for either endorsements or section 36(6) statements.[42] The divesting and revesting only in respect of a volunteer's estate is certainly odd and, theoretically at least, injects an element of lottery between purchasers from assentees and purchasers direct from representatives. We wonder whether there may be something to be said for removing the exception in favour of purchasers from assentees so long as such purchasers were clearly given a right to insist on an endorsement. However, in the unregistered system there will always be the risk that a previous effective conveyance has been made, but it will be very rare for it to happen where the title deeds "remain with the land". We are inclined to believe section 36(5) and (6) should be left as they stand for unregistered land. Views would be welcome.

Registered land

4.11 By and large, although there are details where speculation is possible, the registered system seems to work well. A purchaser will be acquiring a title where either the deceased's name still appears on the title[43] or the representative is registered as proprietor[44] with designation as executor or administrator.[45] It is probable that the first option is

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40 Law of Property Act 1969, s. 23.

41 But see Emmet, Vol. 1, para. 11.118.

42 See R. & R., pp. 668-670; Emmet, Vol. 1, paras. 11.117-11.118.

43 L.R.A., s. 41(3); L.R.R., r. 170.

44 L.R.A., s. 41(1).

45 L.R.R., r. 168(1).

the more popular. However, although there has never been any suggestion that a purchaser, relying on the vendor representative's grant, has suffered by taking a transfer where that vendor has not registered himself as proprietor, a purchaser can insist on his vendor so registering himself.[46] This power to insist does not seem to be much exercised and it is difficult to deduce what was the original motive for the provision. We can see a case for its abolition, at least with respect to sales by representatives especially if the suggestion[47] is implemented that a purchaser without notice of a prior revocation of a grant shall be able to rely on the grant. On the other hand, we wonder whether the practice of allowing representatives to deal with a registered title as proprietors without their being registered as such is a justifiable exception to the paramountly important principle that the register should at all times reflect the current state of the title. We would again welcome views on the issue.

4.12 A purchaser who deals with a representative who has not been registered as proprietor will have to satisfy himself of the existence of the grant and that the transaction comes within the representative's powers. If, having satisfied himself on these scores, he proceeds with an application for registration as a proprietor the Registrar will, after satisfying himself as to the grant of representation, accept the transfer at face value without further investigation.[48] Presumably anyone dealing with a representative registered as proprietor and thus knowing his status because of his designation as executor or administrator will be bound to satisfy himself that the transaction comes within the representative's powers, although he will not need to investigate the grant. In the case of settled land the proprietorship register contains a restriction which

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46 L.R.A., s. 110(5).

47 See para. 2.15 above.

48 L.R.R., r. 170(4), (5).

demands compliance with the provisions of the Settled Land Act, including - expressly - the need to pay capital monies to at least two trustees or a trust corporation.[49] With a trust for sale, somewhat surprisingly in contrast, only the payment to the minimum number of trustees is required.[50] At first sight this might suggest that a disposition clearly outside the powers of a trustee, such as a gift or a sale at an undervalue or a mortgage for an unauthorised purpose, would be valid, but apparently this rather startling implication has never been tested in the courts. Similarly with the registered representative, except that with him there is no express restriction at all, merely the designation of status. Presumably no fiduciary of any of these kinds has attempted blatantly to exceed his powers on the strength of such arguments, or if he has, then presumably the purchaser has refused to take the risk. The admittedly controversial decision in Peffer v. Rigg[51] indicates how the Land Registration Act[52] definitions of "purchaser" and "valuable consideration" (with their inclusion of "good faith" in the one and the exclusion of "nominal consideration" in the other[53]) and the doctrine of constructive

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49 L.R.R., Sched., Forms 9, 10, 11.

50 L.R.R., Sched., Form 62.

51 [1977] 1 W.L.R. 285. P and R contributed equal amounts to be able to buy a property with the aid of a mortgage to provide a home for a relative. The property was registered solely in the name of R without any caution or restriction on the register. Subsequently R "sold" the property to his wife as part of a divorce settlement for the price of £1 and a taking on of the mortgage payments. Mrs. R. knew the circumstances and was held bound by P's rights even though they constituted an unregistered minor interest.

52 In stark contrast with the position under the L.C.A., s. 17(1), where the definitions are strict and favour the purchaser markedly: see Midland Bank Trust Co. Ltd. v. Green [1981] A.C. 513.

53 S. 3(xxi) and (xxxi) respectively.

trusts[54] can be used to overcome in the name of justice apparently comprehensively framed provisions for the protection of purchasers.[55] The temptation for judges to use such devices in the present context is not likely always to be stoutly resisted, especially where a clear breach of trust is involved with equally clear notice of it to the purchaser. It would be helpful to know if it is felt that a greater clarification of the position would be desirable, along with any views on the way in which the registered system operates in respect of dispositions by personal representatives.

Section B Distributions

4.13 The primary means whereby a representative effects a distribution of assets to beneficiaries at the end of administration is the assent. In origin the assent appears not to have been strictly a vestitive[56] act. Instead it was the act of the representative indicating that the asset is no longer needed for retention against payment of debts and that accordingly the beneficiary may now proceed to enjoy the "unblocked" gift made by the will of the deceased. The assentee's[56] title was thus from the will, not from any assignment or conveyance from the representative. Only a will could operate in this way, so that an administrator on intestacy could never assent in pre-1926 law. Whether

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54 See for another example of judicial use of this highly flexible concept, Lyus v. Prowsa Developments Ltd. [1982] 1 W.L.R. 1044.

55 L.R.A., ss. 20(1) and 59(6), in this case.

56 The words "vestitive" and "assentee", although used by some lawyers, do not yet appear in the Oxford English Dictionary. Respectively they signify the quality of vesting property in someone and the person to whom an assent is made.

an administrator cum testamento annexo[57] could assent or not remains uncertain, but the classic assentor was always the executor.[58] Where an assent was not applicable, a clear vestitive act was needed from the representative, and if the law required a formality, such as writing for the assignment of an existing equitable interest,[59] that formality would apply. With an assent, however, any intimation of cessation of administration and permission to enjoy, even if oral or implied, would be effective for land as much as for pure personalty.[60] Furthermore, if the representative was also the beneficiary it is questionable whether even an assent as such was needed: if he had finished administration and had started to enjoy, that transition required no act, not even an implied one.

4.14 The 1925 legislation adopted the expression "assent" to cover the transmission of a legal estate to a beneficiary whether under a will or on an intestacy, but required writing for it.[61] At the same time it did not exclude the alternative use of a deed, which would also be the sole means available if the property to be distributed had not devolved from the deceased but had, for instance, been acquired directly by the representative during administration.[62] Despite the use of the terminology, the new assent of the legal estate is much more an act of disposition than the old permitting of the will to operate. The assent

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57 With the will annexed - granted where either the will appoints no executor or none of those appointed is willing to act.

58 For a summary of the position see A.M. Prichard, "Assents and Assignments to a Tenant in Common of a Remaining Share" (1973) 37 Conv. (N.S.) 42, especially pp. 43-4.

59 L.P.A., s. 53(1)(c).

60 See Wise v. Whitburn [1924] 1 Ch. 460.

61 A.E.A., s. 36(1), (4).

62 As in Re Stirrup's Contract [1961] 1 W.L.R. 449.

vests the legal estate in the assentee, normally with retrospective effect to the death of the deceased.[63] It must not only be in writing and signed by the representative; it must also name the assentee.[64] Oral, implied, and even written assents that do not specify the assentee, all fail to pass any legal estate.[65] This requirement is consistent with the overall policy of the 1925 legislation that title to land, and especially to legal estates in land, shall rest exclusively on clearly worded documentation upon which a purchaser may safely rely.

4.15 In the case of an assent - or indeed any conveyance from a representative - purchasers from the assentee or other disponee have a battery of presumptions and safeguards. As already seen,[66] they cannot lose the legal estate to a subsequent purchaser from the representative even where no endorsement has been made on the grant, although they do run the risk of not obtaining that estate if such a purchase has preceded their own.[67] The purchaser from the assentee or disponee is also exempted from the rights of a representative to recover the property or to be indemnified from it in respect of any unpaid debts, duties and liabilities that may emerge.[68] A similar exemption exists in respect of the rights of "following" property.[69]

4.16 Perhaps the most important of the protections is contained in section 36(7) of the Administration of Estates Act 1925. This enables a

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63 A.E.A., s. 36(2).

64 A.E.A., s. 36(4).

65 Ibid.

66 See para. 4.10 above.

67 A.E.A., s. 36(6).

68 A.E.A., s. 36(9).

69 A.E.A., s. 38.

purchaser safely to assume that the assentee or disponee was the correct recipient without prejudice otherwise to the rights of a rightful claimant to recover the property from any non-purchaser holding it. Less publicised, but also very important, is the entitlement of a purchaser to accept without question the accuracy of any statement of the trusts under which the assentee or disponee is to hold. This is one of the most effective curtain provisions in the whole legislation, and contrasts with its simplicity very favourably with the elaborateness of the strict settlement and trust for sale machinery. Even if there is a totally incorrect transcription of the trusts, the purchaser is safe and there is none of the worry attached to the setting up of a trust for sale in two documents arising from the reasoning in Re Goodall's Settlement.[70]

4.17 Doubts on the reliability of section 36(7) were felt, at least for a time, after the decision in Re Duce and Boots Cash Chemists (Southern) Ltd.'s Contract.[71] That case demonstrated that the protection was not total because the assent was only "sufficient", not conclusive evidence of its own accuracy. However, the doubts seem to be unfounded. The section does not really inject any trace of the conveyancer's nightmare, constructive notice. If the purchaser, having checked for endorsements on the grant as specifically required by the sub-section, takes the assent on its face value and has no indication elsewhere from the title of any error in the assent, he will be safe. In Re Duce the assent, contrary to the policy of the 1925 legislation and good conveyancing practice in the

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70 [1909] 1 Ch. 440. In that case, a conveyance on trust for sale, when construed in the light of the trust instrument, was held not to create an effective trust for sale. In such a case, a purchaser from trustees must ensure that the conveyance on trust for sale was executed, or was intended to take effect, before the trust instrument. Otherwise the purchaser must tear the curtain and check the trust instrument against the conveyance.

71 [1937] Ch. 642: see also para. 1.18 above.

light of that policy, contained recitals that indicated that the wrong person was named as assentee. Since then, the lesson of the decision seems to have been learnt by conveyancers and there is no reason to believe that section 36(7) has not worked effectively and fairly ever since.[72] Unless, therefore, we receive information casting doubt on that conclusion, we would recommend retention of the sub-section as it stands.

4.18 Major conveyancing difficulties in this area appear to arise only where there is a failure to execute an assent complying with section 36(4). Two distinct cases are involved: where the representative does not assent to himself and where he does not assent to someone else. In either case some such documentation as an assent is desirable if safe, tidy conveyancing as envisaged by the 1925 legislation is to be achieved. However, in the former case the document need only witness a change of capacity in an existing land-holding: in the latter it must actually effect a transference of the legal estate in the land.

4.19 The former case, the mere change in capacity and the decision in Re King's Will Trusts,[73] has given rise to controversy. Until that decision most conveyancers had assumed that because no "passage" of the legal estate was involved, section 36(4) had no operation where only a change of capacity was involved. In Re King Pennycuick J., after apparently virtually no real argument,[74] concluded that section 36(4) made a written assent a necessity in such a case. He relied[75] on a dictum of Romer J. in Re Yerburgh,[76] which, however, could perhaps be better

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72 See, e.g., Emmet, Vol. 1, para. 11.119.

73 [1964] Ch. 542.

74 At p. 548.

75 Ibid.

76 [1928] W.N. 208.

construed as asserting the desirability and propriety of a written assent in such circumstances rather than its absolute requirement. He further assumed that the change of capacity involves a divesting, so that there can be a vesting without considering where the estate goes to when it is divested: since vesting is a location in a person and divestment is taking from a person, there appears to be nowhere and no person for the estate to find itself during the transition from and to the same person. The conclusion could also have been affected by the perhaps faulty impression that some sort of assent, if only implied, had been necessary for a change of capacity before 1926.[77] Moreover, the change in the law in 1925[78] which first allowed conveyances to vest land directly[79] in the conveyor, is expressed entirely permissively and does not attempt any analysis of what the operation actually involves: the conveyance may just be an effective declaration to change the character of a landholding and not a true act of disposition. The main part of the judgment in Re King - also much criticised - was concerned with whether an appointment of a new trustee by a representative under the statutory procedure[80] would suffice without an assent: it was held it would not.

4.20 Despite all the criticism of Re King[81] it has been generally recognised[82] that the decision stands and should be accepted as good law.

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77 See para. 4.13 above.

78 L.P.A., s. 72(3).

79 Previously one could normally achieve the desired end by, e.g., a suitable conveyance to uses.

80 T.A., s. 40.

81 See, e.g., J.T. Farrand, "Dissent on Assents", (1964) 108 S.J. 698 and 719; J.F. Garner, "Assents Today", (1964) 28 Conv. (N.S.) 298; R.R.A. Walker, "Personal Representatives Assenting to Themselves", (1964) 80 L.Q.R. 328; Maurice E. Hare, "Re King's Will Trusts", (1966) 63 L.S. Gaz. 145; E.C. Ryder, "Re King's Will Trusts: A Reassessment", [1976] C.L.P. 60.

82 See, e.g., Emmet, Vol. 1, paras. 11.121-122.

It has, moreover, had approval obiter from the Court of Appeal.[83] Even so, the decision is in stark contrast with another, earlier, first-instance decision that has not only assumed great importance in conveyancing but has attracted legislation to give it full conveyancing effectiveness.[84] This is Re Cook.[85] There a widow, who held land as sole surviving trustee for sale for herself beneficially as sole surviving joint tenant, was held to have changed capacity from trustee to beneficial owner without any definitive act, let alone any documentation. The subsequent legislation, which appears to have been fully successful, was concerned solely to provide an adequate conveyancing record of the transition in capacity, not at all to affect the basic principle. Re Cook was not referred to in Re King. It is conceivable that it might have been distinguished on the grounds that (i) section 36(4) created a special regime for assents; (ii) the holding of property by a personal representative is historically a very distinct form of holding in autre droit;[86] and (iii) the representative may perhaps not be regarded in the same light as a trustee here because during administration the beneficial interests are in suspense and he holds rather like a charitable trustee for purposes rather than beneficiaries.[87] However, these seem unsatisfying points of distinction and it is scarcely desirable that changes of capacity should be regarded so differently in the law, with one allegedly involving a divesting and re-vesting and the other no process whatever.

4.21 All this is not to suggest that the practice of representatives making written assents to themselves is not desirable and to be

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83 In Re Edwards' Will Trusts [1982] Ch. 30, at p. 40, per Buckley L.J.

84 Law of Property (Joint Tenants) Act 1964.

85 [1948] Ch. 212.

86 See para. 1.14 above.

87 Ibid.

encouraged. Most conveyancers readily accept that, and many did even before Re King. Changes in capacity as well as actual dispositions should always be documented so that purchasers may be saved from having to investigate equities or taking risks. The statutory follow-up to Re Cook demonstrates this well. However, as with that follow-up, there does not seem for the sustaining of that policy to be an absolute need that the documentation should take the sole form of a conveyance or assent. So long as the purchaser is protected the means is surely unimportant.

4.22 Re King probably has caused less conveyancing difficulty than was feared at the time. The problem cannot really occur once the land is already registered and the Land Registry appear to have been characteristically helpful in freely accepting titles for first registration despite transgression of the case's ratio. In unregistered conveyancing no doubt the profession has been quick to do what it can to avoid the problem by having suitable assents executed in due time at the end of actual administration. However, we are aware that the problem has not totally evaporated and distressing cases where vendors are put to great trouble and expense by it - and often without real fault in anyone - are still occurring. The longer since the representative who failed to assent to himself died, the more severe the problem is likely to be unless there has been the happy chance of an unbroken chain of representation through executors. Nor does it appear that the operation of limitation statutes would be an ideal answer. The failure to assent, especially to oneselves as trustees, may be frequently ascribable to an understandable and not unmeritorious preference to preserve the status quo instead of setting up a strict settlement or trust for sale. We believe that sufficient cases do still arise to justify legislation both to protect and to simplify processes for purchasers and to remedy the plight of unfortunate vendors.

4.23 Remedying would seem to be possible in any one of four ways:

(i) abolition of the need for an assent for mere changes in capacity;

(ii) a clear enactment of the principles of Re King to put matters beyond all doubt;

(iii) implying an assent under certain conditions; and

(iv) deeming an assent to have been made under certain conditions.

As already seen, we recognise the desirability of documented evidence of changes in capacity, but at the same time we believe the problems created by Re King for vendors and purchasers should not be perpetuated. Although the taking out of administration de bonis non is a process that can be very fast,[88] the process of preparing to take it out will often be longer and longer and more and more difficult as time passes: the Re King problems occur almost invariably when the "reality" of administration is long past.[89] Accordingly we would favour rejection of courses (i) and (ii). Course (iii) has much the same demerit as (i). If a representative can assent to himself impliedly, later purchasers will have no clear evidence of that event. Moreover, estates take notoriously differing lengths of time to administer even when the job is tackled expeditiously, so that setting a length of time after the deceased's death would be unrealistic, whilst setting one from the end of actual administration would involve the purchaser in investigation when that occurred.

4.24 As a consequence we have turned to consider whether the desired evidence for a purchaser might be best provided by appropriate documentation as at the time of discovery of the title defect. In virtually all cases the intending vendor or disponor will be in current enjoyment of

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88 See para. 3.7 above.

89 See paras. 3.1, 3.2 and 3.8-3.10 above.

the land and the family history will be known to him and his advisers. The purchaser needs to be protected from having to investigate that history and the equities that go with it - often with all the complications of issues of pedigree involved. The solution we propound as a possible answer to the problem is that a statement be made by the person who would currently be legal owner if an appropriate assent had been made by the representative to himself. The statement would operate somewhat in the same way as section 36(6) has been seen to operate,[90] but enabling an assent to be deemed to have been made. With such a provision (included as a section 36(4A) perhaps) section 36(4) could be amended to make it clear that it includes assents to personal representatives themselves, thus vindicating Re King. As envisaged, the new provision would apply to a statement made in a later instrument by the person in whom the relevant estate or interest would have appeared to be vested if the personal representative had made a proper assent, conveyance or assignment to himself. The statement would be to the effect that at some time the representative had ceased to hold the property for the purposes of administration and that thereafter he could lawfully and properly make an assent, conveyance or assignment to himself in some other capacity. Where such a statement was duly made, it would constitute sufficient evidence of its own accuracy and the representative would be deemed to have executed the necessary assent, conveyance or assignment.

4.25 The second case of a failure to assent,[91] that where there should have been an assent to someone other than the representative himself, also occurs occasionally, we understand, and can cause somewhat similar difficulties. However, we are unsure whether it is as large a problem or as frequent a one and we are hesitant to try to adapt our

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90 See para. 4.10 above.

91 See para. 4.18 above.

suggested solution for the first case directly to it. Although, especially where a grant is taken out without the assistance of lawyers or where lawyers have not been involved continuously in the subsequent administration, there are cases of understandable neglect of the law's formalities, we tend to think that an actual passing of a legal estate is something to be documented even more importantly than a mere change in capacity. Accordingly the need for a written assent should not be relaxed directly. However, with even more tentativeness we suggest for discussion the following procedure. Wherever a person (and any predecessor) has been enjoying[92] the land for a specified period following a letting into such enjoyment (or a permitting of taking such enjoyment) by a representative, a statement in writing by that person that he was entitled to have an assent and has been enjoying the property throughout the specified period since will be a conclusive safeguard for a purchaser without need for further investigation. We would envisage twelve years as perhaps the most appropriate length of time. Within that period a grant de bonis non would have to be taken out to perfect the title. In effect, the policy of the limitation statutes would be adopted, but the purchaser would be exempted from investigating the facts upon which it would operate and would be safeguarded from the notorious risks of a technical inapplicability of one or more of the extremely intricate provisions of those statutes.

4.26 In respect of both types of statement we would reiterate the need for the vendor's advisers to have investigated the position thoroughly before preparing the statement, to ensure that there is no question of anyone else retaining any claim or interest that would be defeated by the operation of the statement for the benefit of the purchaser.[93] We feel

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92 Viz. possession or receipt of rents and profits.

93 See paras. 1.15-1.18 and especially 1.19 above.

that the modern laws of deceit and negligence and, so far as the adviser is concerned, professional negligence[94] will give adequate compensation cover to any such claimant: it should not be a case of the interests of the purchaser totally destroying those of a beneficiary.

4.27 We would be very grateful for expressions of views whether (i) the principle of Re King requiring a written assent for a mere change of capacity should just be abolished; or (ii) the principle should, on the contrary, be statutorily confirmed as it stands; or (iii) some form of "deemed assent" as we have outlined should be enacted. We would naturally also welcome any other suggestions for solution and any information or views on any aspect of the subject.

Registered land

4.28 Our impression is that the process of passage of title on devolution on death works smoothly and has produced no problems. As already seen, it appears that Re King problems cannot arise, and in other cases where no assent or transfer has been made, no doubt the Land Registry will continue to operate its welcome very liberal approach to such problems and to accept what appears a good holding title whatever the shortfall in formalities. Where there is an assent we understand that the provision in Rule 170(5)[95] has proved especially beneficent. It reads:

> It shall not be the duty of the Registrar nor shall he be entitled to consider or to call for any information concerning the reason why any transfer is made, or as to the terms of the will, and, whether he has notice or not of its contents, he shall be entitled to assume that the personal representative is acting (whether by transfer, assent or appropriation or vesting assent) correctly and within his powers.

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94 See Ross v. Caunters [1980] Ch. 297.

95 L.R.R., r. 170(5).

We consider that the case for sustaining this provision is fully made out.[96] We should, however, welcome views on the operation of the system in this area.

Equitable interests

4.29 It is generally assumed that so far as pure personalty and equitable interests in land, especially interests in proceeds of sale under trusts for sale, are concerned, the old pre-1926 law of assents largely applies. Executors may be able to assent to such property orally or even impliedly[97] and, although an administrator cum testamento annexo may also be able to do so, an administrator on intestacy can pass such property only by an assignment in writing.[98] This is despite the equalisation of rights between offices effected by section 21 of the Administration of Estates Act 1925: the distinction is based on the origin of the entitlement (will or intestacy), not on the office. Occasionally there is no escape, in unregistered conveyancing at least, from the need for a title to refer to equities and purchasers who wish to buy accept this.[99] This is especially so with respect to co-ownership interests behind a trust for sale. Again, it may well be helpful to landlords where the tenancy depends on an agreement for a lease to be able to accept an assent from representatives as reliable evidence of who has succeeded to the benefit of that agreement. We can see merits in extending most, if not all, the provisions of section 36 of the Administration of Estates Act 1925 unequivocally to such assents, requiring writing but conferring the benefits of provisions such as sections 36(7) and (8). Again we would welcome views on the point.

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96 See R. & R., p. 664.

97 See para. 4.13 above.

98 Ibid. : see L.P.A., s. 53(1)(c).

99 Despite any rights they might have under L.P.A., s. 42.

PART V
SUMMARY OF CONSULTATION POINTS

5.1 In this working paper we have considered several problems concerning the passage of estates and interests in land following the death of a land-owner, and put forward for comment some tentative proposals for their solution. We welcome views on all the issues involved, but we specifically ask for consideration of the following questions.

5.2 Direct devolution from deceased

(a) The property devolved

(i) Have any conveyancing problems arisen with respect to dealings with any property of a deceased which has not devolved on his personal representatives? (paragraphs 2.2-2.10).

(ii) Have any conveyancing difficulties arisen from the choice of wording in the Administration of Estates Act 1925, in particular, the use of "real estate" to include leaseholds? (paragraph 2.4).

(iii) Do the distinctions between what is real estate (e.g. a trustee's estate, or land held by way of security) and what is personal estate (e.g. an equitable interest behind a trust for sale, or the money secured by a charge) cause any difficulties? (paragraph 2.13).

(iv) Have any conveyancing difficulties arisen in relation to land in respect of which the deceased had a power of appointment, particularly a hybrid power? (paragraph 2.14).

(b) The manner of devolution

(v) What is the extent of the risk caused by revoked but unmarked grants of probate to purchasers in good faith and what are your views on the different solutions put forward? (paragraph 2.15).

(vi) Have any difficulties arisen from the fact that land remains vested in all executors named in the will, including non-proving executors, (for example, where a notice has to be served on all owners of land)? (paragraph 2.17).

(vii) Would it be desirable to extend section 9 of the Administration of Estates Act 1925 to cover any case where there is no executor? (paragraph 2.19).

(viii) Do any problems arise by virtue of the fact that until an administrator is appointed, the property of a deceased vests in the President of the Family Division, who is not a corporation sole? Would it be desirable expressly to provide that property of a deceased shall vest in the holder for the time being of the office of President of the Family Division? (paragraph 2.20).

(ix) In registered land, on the death of a sole registered proprietor, should the deceased's name remain on the register throughout the administration? Alternatively, in whose name should the estate be registered? (paragraph 2.21).

(x) In view of the general problems caused by the need to give notice, we put forward a proposal to allow service on the deceased at his last known address (if the servor was unaware of the death) or "to the personal representatives" at the same address (if the servor knew of the death). Have any difficulties been encountered in the giving of notices where the owner of land has died and would this be a suitable solution? (paragraph 2.22).

(xi) Have any problems arisen where a vendor or purchaser of land dies shortly before completion? In such an situation should an agent, i.e. the party's conveyancer, be able to complete the conveyance? What difficulties are there in obtaining an expedited grant of probate or letters of administration? Is there a need for a specially tailored grant in relation to the sale and/or purchase of a deceased's property, particularly

in the case of chains of conveyancing transactions? What other problems arise as a result of the death of a vendor or purchaser before completion? (paragraphs 2.23-2.35).

(xii) There is a special regime governing the devolution of settled land. Have any conveyancing difficulties occurred:

(a) Where a testator settles land by his will? (paragraph 2.37).
(b) Where the land remains settled land on the death of the deceased? (paragraph 2.38).
(c) Where the land ceases to be settled on the deceased's death? (paragraph 2.39).

We envisage two possible causes of difficulty. Does it in practice cause difficulty that a general grant excepting settled land does not expressly exclude only specified continuing settlements? Do any problems arise from the restricted powers of sale or mortgage which are given to a personal representative taking from a deceased tenant for life or statutory owner? We propose that he should have the same powers as any other representative so far as any purchaser is concerned. Views are welcomed. (paragraph 2.41).

(xiii) Have any problems been encountered owing to the limitations on powers of disposition or any other feature of limited grants of administration? (paragraph 2.42).

(xiv) Have any conveyancing problems arisen where the deceased was a co-owner of land? (paragraph 2.43).

(xv) Are there any particular difficulties associated with the devolution of the deceased's estate in registered land? (paragraph 2.44).

(xvi) Problems arise in the unregistered system following the death of an estate owner, where charges have to be registered in the land

charges register against the name of the estate owner whose estate is intended to be affected. Should registration be permitted against the name of the deceased up to twelve months after his death? We welcome views on this problem, comments on our suggestion, and other possible solutions. (paragraph 2.46).

(xvii) Personal representatives may be liable as tenants under the doctrine of privity of estate where leasehold land devolves to them. Should they be exempt from personal liability to the landlord, at least while acting within their lawful authority, with the estate itself bearing direct liability? We welcome evidence of the extent of this problem and views on how it should be solved. (paragraph 2.47).

5.3 Devolution during administration

(i) Does the present system cause hazards to purchasers where devolution occurs during administration (a) where the pre-existing grant has come to the end of its purpose but some administration remains to be completed or (b) where the executor or administrator has died or been removed before the natural end of the grant? (paragraph 3.3).

(ii) The legal appearance of a continuance of administration can last substantially longer than the reality of the administration: if the administrator dies during that period, a grant de bonis non will usually be taken out. Although this is of little inconvenience where the administration is still going on, it is a pointless exercise where the reality is that the administration has ceased. A purchaser however needs the conveyancing curtain provided by the grant, since otherwise he must investigate the administration. One possible solution would be to provide that a purchaser can rely on a declaration prepared by the vendor's advisers recording the history of the administration, on the basis of which the outstanding "shell" of the legal estate would automatically vest where it should have done. We welcome views on this overall approach. (paragraph 3.10).

(iii) Are there any particular problems associated with registered conveyancing in connection with devolution during administration? (paragraph 3.11).

5.4 Devolution to purchaser and beneficiary

(i) Have any problems arisen in practice from the differences between dispositions in the course of administration and distributions? Should a "beneficiary" granted an undervalue option by will or under an appropriation be treated as a purchaser for value or for money or money's worth? (paragraph 4.1).

(a) Dispositions

(ii) Are the powers of personal representatives to sell satisfactory? In particular, should they be under a duty to obtain the best price even if that means gazumping? (paragraph 4.2).

(iii) Should a personal representative have the benefit of an express conclusive presumption that a purchaser in good faith shall be taken to have given the best consideration reasonably obtainable (like an estate owner under the Settled Land Act)? (paragraph 4.3).

(iv) Should the concurrence of all representatives be needed to sales of an interest behind a trust for sale which are technically interests in the proceeds of sale? (paragraph 4.4).

(v) Is the fact that one representative can make a binding contract to deal with the land (which a purchaser can specifically enforce) satisfactory in view of the requirement that all the representatives must concur in the conveyance that completes the sale? Should contracts for the sale of land be made in the names of all the representatives? (paragraph 4.5).

(vi) Do representatives need extended powers to overreach equitable interests? (paragraph 4.6).

(vii) Although representatives can purchase freehold or leasehold, it appears they cannot mortgage the acquired property even to help towards the purchase price: should they be able to? Are there any other powers that representatives require? (paragraph 4.8).

(viii) Is the protection given to purchasers from representatives, and the protection given to purchasers from assentees adequate? (paragraph 4.10).

(ix) In registered land, should a personal representative be able to deal with the property without being registered as proprietor? Should the purchaser have a right to insist on registration of the vendor representative as proprietor? (paragraph 4.11).

(x) Is the present law relating to the way in which the registered land system operates in respect of dispositions by personal representatives satisfactory? (paragraphs 4.11-4.12).

(b) Distributions

(xi) We recommend retention of section 36(7) of the Administration of Estates Act 1925 which allows a purchaser to accept without question the accuracy of any statement of the trusts under which the assentee is to hold. Is there any reason to believe it has not worked effectively or fairly? (paragraphs 4.16-4.17).

(xii) Failure by a personal representative to execute an assent to himself complying with section 36(4) can cause difficulty for vendors and purchasers when that representative is long since dead. Four options for reform are put forward in paragraph 4.23. We tentatively favour deeming an assent to have been made in certain conditions specified in paragraph 4.24. We welcome opinions on the extent of the problem, and comments on the proposed solutions. (paragraph 4.27).

(xiii) Where a representative should have executed an assent to someone else but merely let that person into enjoyment, we suggest that a statement by that person that he was entitled to an assent coupled with enjoyment of the property for twelve years should be a conclusive safeguard for a purchaser without need for further investigation. (paragraph 4.25). We welcome views on the extent of this problem and our proposals for a solution. (paragraph 4.27).

(xiv) We welcome views on how the passage of title on devolution on death operates in registered land. (paragraph 4.28).

(xv) Is it desirable to extend the requirements for a written assent, together with the benefits of section 36 of the Administration of Estates Act 1925 under subsections (7) and (8), to equitable interests in land? (paragraph 4.29).

APPENDIX I

EXTRACT FROM THE SECOND REPORT OF THE CONVEYANCING COMMITTEE (1985)

Implied Assents

7.16 The basic statutory rule governing dispositions by personal representatives administering the estates of deceased persons is as follows:

> "(1) A personal representative may assent to the vesting, in any person who (whether by devise, bequest, devolution, appropriation or otherwise) may be entitled thereto, either beneficially or as a trustee or personal representative, of any estate or interest in real estate to which the testator or intestate was entitled or over which he exercised a general power of appointment by his will, including the statutory power to dispose of entailed interests, and which devolved upon the personal representative."

> "(4) An assent to the vesting of a legal estate shall be in writing, signed by the personal representative, and shall name the person in whose favour it is given and shall operate to vest in that person the legal estate to which it relates; and an assent not in writing or not in favour of a named person shall not be effectual to pass a legal estate."[20]

A problem in conveyancing practice has occurred where personal representatives are themselves also entitled to a legal estate in some other capacity, commonly as beneficiaries or trustees. For many years it was assumed by conveyancing practitioners that a formal written assent by such personal representatives was not necessary merely to mark a change of capacity as opposed to a passing of the legal estate. This assumption was held to be incorrect in Re King's Will Trusts.[21]

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20 Administration of Estates Act 1925, s. 36.

21 [1964] Ch. 5432 (Pennycuick, J. took the view that such a change of capacity involved in effect a divesting and revesting of the legal estate which could not be distinguished from a passing within s. 36(4) of the Administration of Estates Act 1925).

The reasoning and consequences of the decision have been strongly criticised, in particular because existing titles which relied on implied assents in accordance with established practice were at once rendered defective, and many people have proposed that legislation should reverse Re King's Will Trusts. Submissions we received from The Law Society and the Incorporated Society of Valuers and Auctioneers made the following points:

> "It would simplify conveyancing procedure in relation to assents if this rule . . . could be abolished. The problem has become more acute in recent years, owing to the increasing number of grants of probate or administration being taken out personally." (Law Society)
>
> "This rule should be abolished. The pre-1926 arrangements would provide adequate protection." (ISVA)

Against this it can be said that any serious defects attributable to the decision must by now have been cured by the passage of time (normally 12 years under the Limitation Acts 1939 and 1980). Also it can be emphasised that, as a matter of the best conveyancing practice, any changes affecting title to a legal estate in land should always be formally evidenced in writing for the purposes of future proof and investigation of title.[22] However, it is a fact that most of the submissions received on this point in effect saw the requirement of an assent by a personal representative in his own favour as insisting upon unnecessary paperwork. Further it appears true that such an assent constitutes the sort of procedural formality very likely to trip up that increasing body of persons who endeavour, not entirely unreasonably, to administer the small estates of deceased relatives without paying for legal advice and assistance. In addition, there are other aspects of title to land on or after death which may equally call for reconsideration, for example, the precise powers of executors and administrators respectively, the protection of purchasers relying upon assents, and the chain of representation (Administration of Estates Act 1925, s. 7). Accordingly an examination of the whole area would appear essential in order for proper recommendations to be made as to any part.

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22 Cp. Law of Property Act 1925, s. 72, Schd. 5, Form No. 9.

APPENDIX II

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Administration of Estates Act 1925

1 Devolution of real estate on personal representative

(1) Real estate to which a deceased person was entitled for an interest not ceasing on his death shall on his death, and notwithstanding any testamentary disposition thereof, devolve from time to time on the personal representative of the deceased, in like manner as before the commencement of this Act chattels real devolved on the personal representative from time to time of a deceased person.

(2) The personal representatives for the time being of a deceased person are deemed in law his heirs and assigns within the meaning of all trusts and powers.

(3) The personal representatives shall be the representative of the deceased in regard to his real estate to which he was entitled for an interest not ceasing on his death as well as in regard to his personal estate.

2 Application to real estate of law affecting chattels real

(1) Subject to the provisions of this Act, all enactments and rules of law, and all jurisdiction of any court with respect to the appointment of administrators or to probate or letters of administration, or to dealings before probate in the case of chattels real, and with respect to costs and other matters in the administration of personal estate, in force before the commencement of this Act, and all powers, duties, rights, equities, obligations, and liabilities of a personal representative in force at the commencement of this Act with respect to chattels real, shall apply and attach to the personal representative and shall have effect with respect to real estate vested in him, and in particular all such powers of disposition and dealing as were before the commencement of this Act exercisable as respects chattels real by the survivor or survivors of two or more personal representatives, as well as by a single personal representative, or by all the personal representatives together, shall be excercisable by the personal representatives or representative of the deceased with respect to his real estate.

(2) Where as respects real estate there are two or more personal representatives, a conveyance of real estate devolving under this Part of this Act shall not, save as otherwise provided as respects trust estates including settled land, be made without the concurrence therein of all such representatives or an order of the court, but where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the other or others to prove, any conveyance of the real estate may be made by the proving executor or executors for the time being, without an order of the court, and shall be as effectual as if all the persons named as executors had concurred therein.

(3) Without prejudice to the rights and powers of a personal representative, the appointment of a personal represenative in regard to real estate shall not, save as hereinafter provided, affect -

(a) any rule as to marshalling or as to administration of assets;

(b) the beneficial interest in real estate under any testamentary disposition;

(c) any mode of dealing with any beneficial interest in real estate, or the proceeds of sale thereof;

(d) the right of any person claiming to be interested in the real estate to take proceedings for the protection or recovery thereof against any person other than the personal represenative.

3 Interpretation of Part I

(1) In this Part of this Act "real estate" includes -

(i) Chattels real, and land in possession, remainder, or reversion, and every interest in or over land to which a deceased person was entitled at the time of his death; and

(ii) Real estate held on trust (including settled land) or by way of mortgage or security, but not money to arise under a trust for sale of land, nor money secured or charged on land.

(2) A testator shall be deemed to have been entitled at his death to any interest in real estate passing under any gift contained in his will which operates as an appointment under a general power to appoint by will, or operates under the testamentary power conferred by statute to dispose of an entailed interest.

(3) An entailed interest of a deceased person shall (unless disposed of under the testamentary power conferred by statute) be deemed an interest ceasing on his death, but any further or other interest of the deceased in the same property in remainder or reversion which is capable of being disposed of by his will shall not be deemed to be an interest so ceasing.

(4) The interest of a deceased person under a joint tenancy where another tenant survives the deceased is an interest ceasing on his death.

(5) On the death of a corporator sole his interest in the corporation's real and personal estate shall be deemed to be an interest ceasing on his death and shall devolve to his successor.

This subsection applies on the demise of the Crown as respects all property, real and personal, vested in the Crown as a corporation sole.

7 Executor of executor represents original testator

(1) An executor of a sole or last surviving executor of a testator is the executor of that testator.

This provision shall not apply to an executor who does not prove the will of his testator, and, in the case of an executor who on his death leaves surviving him some other executor of his testator who afterwards proves the will of that testator, it shall cease to apply on such probate being granted.

(2) So long as the chain of such representation is unbroken, the last executor in the chain is the executor of every preceding testator.

(3) The chain of such representation is broken by -

(a) an intestacy; or

(b) the failure of a testator to appoint an executor; or

(c) the failure to obtain probate of a will;

but is not broken by a temporary grant of administration if probate is subsequently granted.

(4) Every person in the chain of representation to a testator -

(a) has the same rights in respect of the real and personal estate of that testator as the original executor would have had if living; and

(b) is, to the extent to which the estate whether real or personal of that testator has come to his hands, answerable as if he were an original executor.

27 Protection of persons acting on probate or administration

(1) Every person making or permitting to be made any payment or disposition in good faith under a representation shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of the representation.

(2) Where a representation is revoked, all payments and dispositions made in good faith to a personal representative under the representation before the revocation thereof are a valid discharge to the person making the same; and the personal representative who acted under the revoked representation may retain and reimburse himself in respect of any payments or dispositions made by him which the person to whom representation is afterwards granted might have properly made.

36 Effect of assent or conveyance by personal representative

(1) A personal representative may assent to the vesting, in any person who (whether by devise, bequest, devolution, appropriation or otherwise) may be entitled thereto, either beneficially or as a trustee or personal representative, of any estate or interest in real estate to which the testator or intestate was entitled or over which he exercised a general power of appointment by his will, including the statutory power to dispose of entailed interests, and which devolved upon the personal representative.

(2) The assent shall operate to vest in that person the estate or interest to which the assent relates, and, unless a contrary intention appears, the assent shall relate back to the death of the deceased.

(3) The statutory covenants implied by a person being expressed to convey as personal representative, may be implied in an assent in like manner as in a conveyance by deed.

(4) An assent to the vesting of a legal estate shall be in writing, signed by the personal representative, and shall name the person in whose favour it is given and shall operate to vest in that person the legal estate to which it relates; and an assent not in writing or not in favour of a named person shall not be effectual to pass a legal estate.

(5) Any person in whose favour an assent or conveyance of a legal estate is made by a personal representative may require that notice of the assent or conveyance be written or endorsed on or permanently annexed to the probate or letters of administration, at the cost of the estate of the deceased, and that the probate or letters of administration be produced, at the like cost, to prove that the notice has been placed thereon or annexed thereto.

(6) A statement in writing by a personal representative that he has not given or made an assent or conveyance in rspect of a legal estate, shall, in favour of a purchaser, but without prejudice to any previous disposition made in favour of another purchaser deriving title mediately or immediately under the personal representative, be sufficient evidence that an assent or conveyance has not been given or made in respect of the legal estate to which the statement relates, unless notice of a previous assent or conveyance affecting that estate has been placed on or annexed to the probate or administration.

A conveyance by a personal representative of a legal estate to a purchaser accepted on the faith of such a statement shall (without prejudice as aforesaid and unless notice of a previous assent or conveyance affecting that estate has been placed on or annexed to the probate or administration) operate to transfer or create the legal estate expressed to be conveyed in like manner as if no previous assent or conveyance had been made by the personal representative.

A personal representative making a false statement, in regard to any such matter, shall be liable in like manner as if the statement had been contained in a statutory declaration.

(7) An assent or conveyance by a personal representative in respect of a legal estate shall, in favour of a purchaser, unless notice of a previous assent or conveyance affecting that legal estate has been placed on or annexed to the probate or administration, be taken as sufficient evidence that the person in whose favour the assent or conveyance is given or made is the person entitled to have the legal estate conveyed to him, and upon the proper trusts, if any, but shall not otherwise prejudicially affect the claim of any person rightfully entitled to the estate vested or conveyed or any charge thereon.

(8) A conveyance of a legal estate by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral, and testamentary or administration expenses, duties, and legacies of the deceased have been discharged or provided for.

(9) An assent or conveyance given or made by a personal representative shall not, except in favour of a purchaser of a legal estate, prejudice the right of the personal representative or any other person to recover the estate or interest to which the assent or conveyance relates, or to be indemnified out of such estate or interest against any duties, debts, or liability to which such estate or interest would have been subject if there had not been any assent or conveyance.

(10) A personal representative may, as a condition of giving an assent or making a conveyance, require security for the discharge of any such duties, debt, or liability, but shall not be entitled to postpone the giving of an assent merely by reason of the subsistence of any such duties, debt or liability if reasonable arrangements have been made for discharging the same; and an assent may be given subject to any legal estate or charge by way of legal mortgage.

(11) This section shall not operate to impose any stamp duty in respect of an assent, and in this section "purchaser" means a purchaser for money or money's worth.

(12) This section applies to assents and conveyances made after the commencement of this Act, whether the testator or intestate died before or after such commencement.

37 Validity of conveyance not affected by revocation of representation

(1) All conveyances of any interest in real or personal estate made to a purchaser either before or after the commencement of this Act by a person to whom probate or letters of administration have been granted are valid, notwithstanding any subsequent revocation or variation, either before or after the commencement of this Act, of the probate or administration.

(2) This section takes effect without prejudice to any order of the court made before the commencement of this Act, and applies whether the testator or intestate died before or after such commencement.

39 Powers of management

(1) In dealing with the real and personal estate of the deceased his personal representatives shall, for purposes of administration, or during a minority of any beneficiary or the subsistence of any life interest, or until the period of distribution arrives, have -

(i) the same powers and discretions, including power to raise money by mortgage or charge (whether or not by deposit of documents), as a personal representative had before the commencement of this Act, with respect to personal estate vested in him, and such power of raising money by mortgage may in the case of land be exercised by way of legal mortgage; and

(ii) all the powers, discretions and duties conferred or imposed by law on trustees holding land upon an effectual trust for sale (including power to overreach equitable interests and powers as if the same affected the proceeds of sale); and

(iii) all the powers conferred by statute on trustees for sale, and so that every contract entered into by a personal representative shall be binding on and be enforceable against and by the personal representative for the time being of the deceased, and may be carried into effect, or be varied or rescinded by him, and, in the case of a contract entered into by a predecessor, as if it had been entered into by himself.

(2) Nothing in this section shall affect the right of any person to require an assent or conveyance to be made.

(3) This section applies whether the testator or intestate died before or after the commencement of this Act.

Power of High Court to appoint substitute for, or to remove, personal representative

50. - (1) Where an application relating to the estate of a deceased person is made to the High Court under this subsection by or on behalf of a personal representative of the deceased or a beneficiary of the estate, the court may in its discretion -

(a) appoint a person (in this section called a substituted personal representative) to act as personal representative of the deceased in place of the existing personal representative or representatives of the deceased or any of them; or

(b) if there are two or more existing personal representatives of the deceased, terminate the appointment of one or more, but not all, of those persons.

(2) Where the court appoints a person to act as a substituted personal representative of a deceased person, then -

(a) if that person is appointed to act with an executor or executors the appointment shall (except for the purpose of including him in any chain of representation) constitute him executor of the deceased as from the date of the appointment; and

(b) in any other case the appointment shall constitute that person administrator of the deceased's estate as from the date of the appointment.

(3) The court may authorise a person appointed as a substituted personal representative to charge remuneration for his services as such, on such terms (whether or not involving the submission of bills of charges for taxation by the court) as the court may think fit.

(4) Where an application relating to the estate of a deceased person is made to the court under subsection (1), the court may, if it thinks fit, proceed as if the application were, or included, an application for the appointment under the Judicial Trustees Act 1896 of a judicial trustee in relation to that estate.

(5) In this section,"beneficiary", in relation to the estate of a deceased person, means a person who under the will of the deceased or under the law relating to intestacy is beneficially interested in the estate.

(6) In section 1 of the Judicial Trustees Act 1896, after subsection (6) there shall be added -

"(7) Where an application relating to the estate of a deceased person is made to the court under this section, the court may, if it thinks fit, proceed as if the application were, or included, an application under section 50 of the Administration of Justice Act 1985 (power of High Court to appoint substitute for, or to remove, personal representative).".

110. -(1) On a sale, exchange, lease, mortgage, charge, or other disposition, a purchaser dealing in good faith with a tenant for life or statutory owner shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent as the case may require, that could reasonably be obtained by the tenant for life or statutory owner, and to have complied with all the requisitions of this Act.

(2) A purchaser of a legal estate in settled land shall not, except as hereby expressly provided, be bound or entitled to call for the production of the trust instrument or any information concerning that instrument or any ad valorem stamp duty thereon, and whether or not he has notice of its contents he shall, save as hereinafter provided, be bound and entitled if the last or only principal vesting instrument contains the statements and particulars required by this Act to assume that -

(a) the person in whom the land is by the said instrument vested or declared to be vested is the tenant for life or statutory owner and has all the powers of a tenant for life under this Act, including such additional or larger powers, if any, as are therein mentioned;

(b) the persons by the said instrument stated to be the trustees of the settlement, or their successors appearing to be duly appointed, are the properly constituted trustees of the settlement;

(c) the statements and particulars required by this Act and contained (expressly or by reference) in the said instrument were correct at the date thereof;

(d) the statements contained in any deed executed in accordance with this Act declaring who are the trustees of the settlement for the purposes of this Act are correct;

(e) the statements contained in any deed of discharge, executed in accordance with this Act, are correct;

Provided that, as regards the first vesting instrument executed for the purpose of giving effect to -

(a) a settlement subsisting at the commencement of this Act; or

(b) an instrument which by virtue of this Act is deemed to be a settlement; or

(c) a settlement which by virtue of this Act is deemed to have been made by any person after the commencement of this Act; or

(d) an instrument inter vivos intended to create a settlement of a legal estate in land which is executed after the commencement of this Act and does not comply with the requirements of this Act with respect to the method of effecting such a settlement;

a purchaser shall be concerned to see -

(i) that the land disposed of to him is comprised in such settlement or instrument;

(ii) that the person in whom the settled land is by such vesting instrument vested, or declared to be vested, is the person in whom it ought to be vested as tenant for life or statutory owner;

(iii) that the persons thereby stated to be the trustees of the settlement are the properly constituted trustees of the settlement.

(3) A purchaser of a legal estate in settled land from a personal representative shall be entitled to act on the following assumptions:-

(i) If the capital money, if any, payable in respect of the transaction is paid to the personal representative, that such representative is acting under his statutory or other powers and requires the money for purposes of administration;

(ii) If such capital money is, by the direction of the personal representative, paid to persons who are stated to be the trustees of a settlement, that such persons are the duly constituted trustees of the settlement for the purposes of this Act, and that the personal representative is acting under his statutory powers during a minority;

(iii) In any other case, that the personal representative is acting under his statutory or other powers.

(4) Where no capital money arises under a transaction, a disposition by a tenant for life or statutory owner shall, in favour of a purchaser of a legal estate, have effect under this Act notwithstanding that at the date of the transaction there are no trustees of the settlement.

(5) If a conveyance of or an assent relating to land formerly subject to a vesting instrument does not state who are the trustees of the settlement for the purposes of this Act, a purchaser of a legal estate shall be bound and entitled to act on the assumption that the person in whom the land was thereby vested was entitled to the land free from all limitations, powers, and charges taking effect under that settlement, absolutely and beneficially, or, if so expressed in the conveyance or assent, as personal representative, or trustee for sale or otherwise, and that every statement of fact in such conveyance or assent is correct.

of the highly subjective nature of the concept of dishonesty; and neither, for the same reason, was it a judicial task to define or assess dishonesty. Hence, dishonesty was to be defined by reference to statutory intention alone. In relation to the offences of obtaining by deception, Fullagar J. ruled that dishonesty imported an absence of belief by the defendant that he had in all the circumstances a legal right to deprive the other person of property.

60. This is then a specialised meaning of the term, somewhat different from common understanding, for it thus rules out as a good defence a belief in a moral or other similar kind of right to deprive the victim, and establishes that there is no other defence. Fullagar J. justified this specialised meaning on the ground that it is hard to imagine the concept of an obtaining by deception which is not dishonest in ordinary terms: a specialised meaning must have been intended by the legislature.

61. Subsequent decisions[63] establish that the definition of dishonesty articulated by Fullagar J. applied to all crimes of dishonesty, with McInerney J. expressly holding himself bound by this decision in Bonollo,[64] despite his personal preference for the objective approach of Feely.[65]

(c) Northern Territory

62. The recently enacted Criminal Code contains, in Part VII, provisions on property offences which are in many respects similar to the Theft Act 1968. There are, however, a number of differences between this Code and the English provisions. Some of these are noted below.

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63. Brow [1981] V.R. 783; Bonollo [1981] V.R. 633.

64. [1981] V.R. 633, 643.

65. [1973] Q.B. 530.

(i) Theft

63. This is modelled in large part on the English provisions. One important omission is that there is no requirement of "dishonesty". Instead, the offence[66] includes an element of "unlawfulness" which means "without authorization, justification or excuse." The maximum penalty is seven years' imprisonment, which is increased to fourteen years' if, inter alia, the thing stolen has a value of $100,000 or more.[67]

(ii) Unlawfully obtaining confidential information or disclosing trade secrets

64. Unlawfully abstracting confidential information from any register, document or computer with intent to cause loss or use it to obtain a benefit is a separate offence,[68] as is the unlawful disclosure of trade secrets with a similar intent.[69] Both offences carry a maximum penalty of three years' imprisonment.

(iii) Criminal deception

65. Three offences of deception are provided which are derived from the offences originally recommended by the Criminal Law Revision Committee,[70] but not enacted in that form in the Theft Act 1968, that is to say: obtaining property; obtaining credit; and inducing a person to engage in any conduct for the purposes of gain for himself or another. The last mentioned offence carries a maximum penalty of seven years' imprisonment. Neither dishonesty nor unlawfulness are required elements of the deception offences.

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66. Sects. 209 and 210.

67. Sect. 210(2).

68. Sect. 222.

69. Sect. 223.

70. See para. 3.2 et seq., above.

(d) Conspiracy to defraud

66. The laws of conspiracy in Australia are, with the exception of Victoria, basically the same as the position in England prior to the passing of the Criminal Law Act 1977. In 1984 Victoria enacted a similar, but not identical, statute to the conspiracy provisions of the 1977 Act.[71]

67. All States possess an offence of conspiracy to defraud. In South Australia, New South Wales and Victoria the offence is retained at common law; the Code States have provided similar offences in their Criminal Codes.[72]

68. Appeal courts in three States have recently held that, unless and until the Australian High Court determines otherwise, the English decision in Scott[73] should be viewed as correctly stating the elements of the offence of conspiracy to defraud in Australia.[74]

69. The cases of Walsh[75] and Eade[76] raise the problem of whether the element of dishonesty should be defined for the jury. Both cases hold that the decision in Scott should also guide here; the judge should not direct the jury as to the meaning of "to defraud", but leave the jury to determine it according to the standards of ordinary people. Commentators have noted the resultant inconsistency of approach towards

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71. Crimes (Conspiracy and Incitement) Act 1984.

72. Queensland Code, s.430; Western Australian Code, (s. 412); Tasmanian Code, (s. 297(1)(d)); Northern Territory of Australia Criminal Code Act 1983 (s. 284).

73. Scott v. Metropolitan Police Commissioner [1975] A.C. 819: see para. 2.1., above.

74. Horsington [1983] 2 N.S.W.L.R. 72; Walsh [1984] V.R. 474 (Vic. Sup. Ct.); Eade (1984) 14 A. Crim. R. 186 (S.A. Sup. Ct).

75. Ibid.

76. Ibid.

the meaning and definition of dishonesty between the Victorian laws of deception and conspiracy to defraud.[77]

70. In Hoar[78] the High Court of Australia ruled that in general it was undesirable that conspiracy should be charged when a substantive offence had been committed and there was a sufficient and effective charge to cover the conduct of the accused. Murphy J. was more forthright. He averted to the "amorphous nature of conspiracy" and said that the "overzealous use of conspiracy charges... brings the administration of criminal justice into disrepute."[79] However, the courts are also aware of the fact that on occasion, a charge of conspiracy may strike at the heart of the conduct of the accused more than the charge of a substantive offence. In these situations, the courts are able to take a broad approach and proceed against the essence of the wrongdoing.[80]

(e) Conspiracy to defraud the Commonwealth

71. Section 86 of the Crimes Act 1914 (Cth.) creates an offence of defrauding the Commonwealth, the essence of which is very similar to the state conspiracy offences. The Federal Court of Australia in Einem v. Edwards[81] recently followed the Ghosh[82] test for dishonesty.

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77. Gillies, (Comment on Walsh) [1984] 1 Crim L.J. 184; Goode, (Comment on Eade), [1985] 1 Crim L.J. 177.

78. (1981) 37 A.L.R. 357 (H. Ct. Aus.).

79. At pp. 363-4.

80. Debellis (1984) 36 S.A.S.R. 1.

81. (1984) 12 A. Crim. R. 463.

82. [1982] Q.B. 1053: see para. 2.4, above.

4. United States of America

72. Criminal Law in the United States is predominantly a state concern, each having its own penal code which covers the main offences against property. However, the Federal Government is also active in important aspects of this field, especially where conduct may affect more than one state or embrace federal services, such as the mail. Accordingly, both state and federal provisions will be considered.

73. The penal code of each state is independent, and until recently there were major differences across the states. However, the publication of the Model Penal Code ("MPC") in 1962 has influenced the preparation of new, and largely similar Codes in about two-thirds of the states. In addition, Congress has been at work on an integrated Code of federal criminal law.[83]

74. The following is a brief account of the general position of the laws relating to fraud in the USA, although particular provisions will vary from state to state. Examples of specific offences will generally be taken from the MPC, as this will often achieve the closest statement of the laws of the majority of states.

75. In common with many other jurisdictions, there was traditionally a threefold division of the main acquisitive offences at common law, into larceny, embezzlement and false pretences. A recent trend in the United States, however, has been to consolidate these into a single crime of theft. This aims to simplify the pleading of charges without changing the substantive elements of the offences. Hence, one may be convicted of theft on proof of unlawful taking or disposition, obtaining property by deception, obtaining services, unauthorised use of vehicles etc.[84]

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83. Based upon a Report of the National Commission on Reform of Federal Criminal Laws (1971).

84. M.P.C., Arts 223.2-9.

(a) Theft by unlawful taking

76. The offence of theft by unlawful taking in the MPC attaches to the unlawful taking or disposition of property.[85]

(i) Property that can be stolen

77. Property is generally defined so as to overcome the common law restrictions as to the forms of property that could be the subject of larceny. The authors of the MPC intended to cover "anything that is part of one person's wealth and that another person can appropriate".

78. In response to the growing awareness of the problems of computer misuse, some states have sought to incorporate computer related crime into the general provisions of their penal codes. For example, Virginia defined computer time and services or data processing services or information or data stored in connection therewith as property that may be the subject of theft.[86]

(ii) The mental element of theft by unlawful taking

79. The requisite mental element for the offence generally consists of the absence of a claim of right,[87] and an intent to deprive the victim either permanently, or for so long a period as to appropriate, or make worthless to the victim, a major portion of its economic value.

(b) Theft by deception

80. The offence consists in the obtaining of property of another, with intent, by deception. "Property" has the same meaning as it has in the offence of theft by unlawful taking.

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85. Ibid., Art. 223.2.

86. Va. Code 18.2 - 98.1, now replaced by Va. 18.2 - 152.1 et seq.

87. Some states (e.g. Iowa, Oregon) stipulate that a belief in a claim of right must be reasonable, rather than merely honest.

81. The authors of the MPC note that a separate deception offence is strictly unnecessary, since a broad definition of theft by unlawful taking (as in the MPC) may be adequate, either alone, or by simple amendment, to reach the conduct of false pretences. However, the Code includes the offence because of the special problems that arise in this area relating to the specification of the kinds of deception that should be sufficient to support conviction. It is generally considered desirable that these questions be resolved by legislation. Further, while the offence of theft by unlawful taking seeks to penalise the unlawful taking or exercise of control, the deception offence aims to regulate the methods by which the transfer of a legal interest in the property is achieved. It would seem that the MPC has avoided the need for the courts to raise complex questions relating to the passing of property (which have beset some other jurisdictions), by its definition of "obtaining"[88] as being to bring about a transfer, or purported transfer of a legal interest in property.

(i) Deception

82. The MPC provides a broad definition of conduct that amounts to a deception[89] with a view to including all forms of behaviour that should be the subject of criminal sanction when used, with intent, to obtain property. The MPC expressly includes representations relating to future intention, representations of value etc., recognising that such conduct will not always be sufficiently serious to attract penalty, but being of the opinion that a rigid rule against liability should not be established because it would be open to abuse. The authors are confident that trivial conduct would not fall under the section, since it expressly provides that mere non-performance of a promise shall not ground an inference of deception, and that matters having no pecuniary significance shall not amount to deception within the section.

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88. M.P.C., Art. 223.0(5).

89. Art. 223.3.

(ii) The mental element

83. The offence requires proof of purpose. The actor must intend to obtain the property of another, and must have a purpose to deceive.

(c) Further specific offences

84. Almost all the states have supplemented the general offences outlined above by a series of additional, specific offences. Some are examined briefly here.

(i) Theft of Services

85. The MPC defines this offence,[90] as the obtaining of services by means of deception, threat, false token or "other fraudulent means to avoid payment for the service". The offence is designed to supplement the deception offence, which is tied to the obtaining of property, and a broad definition of services is adopted to include anything that the actor "knows is available only for compensation". Further the section establishes a presumption of fraud where the service is normally paid for immediately, and payment is refused or the accused absconds without payment. Some states (e.g. Delaware) specifically reject this presumption.

(ii) Passing bad cheques

86. This offence[91] (passing a bad cheque in the knowledge that it will not be honoured by the drawer) avoids the more stringent requirements of the false pretence offence that property actually be obtained by a false instrument, and that a wilfully fraudulent intent be proved.

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90. Art. 223.7.

91. See e.g. M.P.C., Art. 224.5.

(iii) Credit cards

87. Several states have adopted an offence[92] of using a credit card to obtain property or services with knowledge that the card was stolen or forged, had been revoked or cancelled, or the use of the card was for any other reason unauthorised by the user. The reason, again, was to fill a gap in the law not perceived to be covered by the false pretences offence.

(iv) Securing execution of documents by deception

88. The MPC defines this offence[93] as by deception, causing another to execute any instrument affecting, purporting to affect, or likely to affect the pecuniary interest of any person. Its function is to cover the securing of non-property type offences, such as partnership agreements, employment contracts, guarantees, etc.

(d) The efficacy of state provisions

89. It would seem that the provisions of most state codes deal fairly comprehensively with many specified forms of fraudulent conduct. State prosecution of fraud is, however, severely limited by the fact that the codes only cover fraud committed within the state, and the nature of fraud is that fraudsters tend to make a quick profit, and then move on. Furthermore, criticism has been directed towards the substance of the state codes; state attorneys must rely on the theft statutes which focus on loss to the victim rather than on the fraudulent conduct itself, the essence of the offence. This is an important reason for the development of federal offences in this field.

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92. See e.g. M.P.C., Art. 224.6.

93. Sect. 224.14.

(e) The Federal offences

90. A recent expansion in resources devoted to the investigation and prosecution of white collar crime has resulted in a growing use of the more general federal statutes. Hurson[94] attributes this to the fact that since prosecutors set about gathering as much information as possible, with little thought as to the specific statute under which they will ultimately prosecute, they often find themselves with long and complex sets of facts which do not necessarily reveal a traditional offence, but which will amply support a charge under one of the broader federal offences.

91. Fraudulent schemes are prohibited under three similar federal statutes of Title 18 of the US Code, each of which attaches to a different instrument of interstate commerce or communication by which a scheme to defraud is perpetrated: the mails under the Mail Fraud Statute,[95] telecommunications under the Wire Fraud Statute[96] and the inducing of victims to travel in interstate commerce under the Travel Act[97]. These statutes have been interpreted extremely broadly. Hence, while the scheme must be shown to be "reasonably calculated to deceive persons of ordinary prudence and comprehension"[98] it is not necessary that the scheme to defraud be successful[99] or that the victims actually suffered loss.[100] Also, the scheme need not relate to economic matters at all; the statute can reach artifices designed to cause intangible losses.[101] Decisions such as these have led commentators to believe that the mail fraud statute now embraces almost any set of facts that

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94. "Limiting Mail Fraud", 20 Am. Crim. L. Rev. 1 (1983).

95. Sect. 1341.

96. Sect. 1343.

97. Sect. 2314.

98. US v. Bohunus 628 F. 2d, 1160,1172.

99. E.g. US v. Hewes 729 F 2d. 1302, 1321 (11th Cir. 1984).

100. E.g. US v. Strong 702 F. 2d. 97, 100 (6th Cir. 1983).

101. E.g. US v. Bronston 658 F. 2d 920 (2d Cir. 1981), cert. den., 102 S. Ct. 1769 (1982).

involves deception by one who can be said to owe a duty of honesty to another.[102] The boundaries of the offences are neither limited by common law concepts of fraud or false pretences, nor contingent on violations of state or federal law.

(i) The mental element

92. Curnow has argued that the mental element of the federal offences has gradually been relaxed and it has been held that recklessness, gross carelessness, indifference or deliberate blindness as to the truth can establish the necessary criminal intent.[103] Also, indirect evidence of intention is sufficient.[104] Curnow argues that the reason for this development in the federal courts is that they are "simply tired" of seeing vast losses to victims, caused not only by "downright criminals", but also by "smooth talking, fast-moving businessmen too concerned with making money for themselves", and hearing the "self-saving, time-worn phrase, 'well that's just business' used as an excuse for the losses of millions of dollars."[105]

(ii) The use of the mails etc.

93. The statutes require that the mails or wire be used "for the purpose of executing the scheme to defraud", but this has also received a liberal interpretation. It need not actually be proved that the use of the mails was necessary to the fraudulent scheme; it need only be "incident to an essential part" of the scheme. Some courts have convicted where the defendant neither intended to use the mails, nor did so: the government need only show that the accused acted in the

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102. E.g. Hurson, loc. cit. (n.94).

103. Curnow, 35 Fed B.J. 21 (1976).

104. Pereira v. US 347 U.S. 8.

105. Curnow, loc cit.

knowledge that the use of the mails etc. would "follow in the ordinary course of business".[106]

94. These offences have attracted considerable criticism, for their breadth and scope.[107] The central problem in the treatment of fraud cases has been described in the following terms:[108]

> "At its current pace of expansion, the mail fraud statute seems destined to provide the federal prosecutor with what Archimedes long sought - a simple fulcrum from which one can move the world. Useful as this expansion may be to the prosecutor, its consequence is also to dwarf and trivialise much of the remainder of the substantive criminal law... Yet conversely, if we freeze the evolution of the statute, new forms of predatory behaviour will appear to which the legislature cannot realistically be expected to respond quickly. What compromise then is possible between strict construction and infinite expansion?

Many writers are convinced of a pressing need for legislative reform to bring the offences within defined and manageable limits, and to give authoritative guidance as to what forms of fraudulent scheme should be prosecuted.

95. The Federal Criminal Code Bill, introduced in 1978, aimed to limit the operation of these federal statutes to a certain extent, although prosecutorial needs remained important; hence, schemes to defraud remained undefined. However, the Bill has not yet become law.

(f) Conspiracy to defraud

96. At common law, the state offences of conspiracy consist in an agreement to commit an unlawful act, or to commit a lawful act by unlawful means. However, common law conspiracy has been modified by

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106. See e.g. Pereira v. US 347 U.S. 8.

107. See for example Coffee, 19 Am. Crim. L. Rev. 117 (1981).

108. Coffee, 21 Am. Crim. L. Rev. 1 (1983).

many state legislatures to require that an "overt act" be performed in pursuance of the scheme, and that the target act be a crime.

97. In addition to the state conspiracy offences, the US Code provides an offence of conspiracy to defraud the United States "in any manner or for any purpose".[109] Federal law is thus significantly wider than state law and has attracted criticism because it is weighted too heavily in favour of the prosecution, and it focuses on an ancillary element of conduct to evade the need to allege and prove specific offences. The Federal Criminal Code Bill introduced into Congress in 1978 would have rendered federal conspiracy an offence only when there was proved an agreement to commit or cause the commission of a crime. The Bill also contained a specific offence of defrauding the Government, with a special defence protecting the dissemination of information.

(g) The New York Scheme to Defraud Statute

98. This statute, which became operative in 1977, was specifically modelled upon the federal mail fraud statute in an attempt to give the state a direct means of prosecuting cases of consumer fraud which had been difficult under the theft statutes. The statute defines two degrees of the offence:

> s. 190.65 Scheme to defraud in the first degree
> 1. A person is guilty of a scheme to defraud in the first degree when he
>
> (a) engages in a scheme constituting a systematic ongoing course of conduct with intent to defraud ten or more persons or to obtain property from ten or more persons by false or fraudulent pretenses, representations or promises, and
>
> (b) so obtains property from one or more such persons.
>
> 2. In any prosecution under this section it shall be necessary to prove the identity of at least one person from whom the defendant so obtained property, but it shall not be necessary to prove the identity of any other intended victim.

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109. Title 18, s.371 (1948).

The statute has many of the prosecutorial advantages of the mail fraud statute in that it emphasises the conduct of the defendant and not the loss to the individual victims; and may encompass fraud dealing with intangibles and various kinds of legal rights.

5. France

99. Article 405 of the French Penal Code (as amended to 1986) provides as follows:

> "Any person assuming a false name or identity, or using deceptive means, so as to induce belief in fraudulent ventures, or of fictitious power or credit, or to suggest hope or fear of success, accident or other imaginary event, and obtains or attempts to obtain any money, moveables or obligations, releases, notes, promises, or receipts, and by any such means shall swindle or attempt to swindle another out of his property, in whole or in part, shall be punished by jailing for not less than one nor more than five years and by fine of 3,600 to 2,500,000 francs.
>
> "Any person who commits such misdemeanour by floating a public issue of stocks, bonds, shares or other negotiables, of any entity or industrial or trading enterprise, shall be punished by imprisonment up to ten years and by a fine up to 5,000,000 francs.
>
> "In all such cases the perpetrator may, furthermore, be deprived of his civil rights provided by Article 42 of this Code for no more than ten years; he may also be restricted in his freedom of movement."

6. Federal Republic of Germany

(a) Theft

100. Section 242 of the West German Penal Code (as at 1981) provides as follows:

> "Anyone who takes a moveable thing belonging to another with the intention of appropriating it for himself unlawfully, is punishable with imprisonment for up to five years or a fine."

(b) Fraud

101. Section 263 provides that:

> "Anyone who, intending to obtain an unlawful 'property advantage' for himself or a third party, thereby damages the 'property interests' of another by inducing a mistake by means of false pretences or the misrepresentation or suppression of true facts, is punishable with imprisonment for up to five years or a fine."

The penalty for aggravated fraud is one year's imprisonment up to a maximum of ten years.

7. Sweden

102. The following are extracted from Chapter 9 of the Penal Code of Sweden: Of Fraud and Other Dishonesty.

Section 1

> A person who by deception induces someone to do or not to do something which involves gain for the offender and loss for the dupe or someone he represents, shall be sentenced for fraud to imprisonment for at most two years.
>
> A person shall also be sentenced for fraud who, by delivering incorrect or incomplete information, by making alterations in a programme or recording or by other means, unlawfully affects the result of automatic processing or any other similar automatic process which involves gain for the offender and loss for any other person.

Section 2

> If, considering the size of the loss and other circumstances of the crime mentioned in Section 1, the offence is regarded as petty, a fine or imprisonment for at most six months shall be imposed for fraudulent conduct.
>
> If a person uses lodging, meals, transportation or admission to a show or anything similar offered on condition of payment in cash, and he fails to meet his obligation, he shall, whether he deceived anyone or not, be sentenced for fraudulent conduct. This shall not apply, however, if the act concerns a not insubstantial amount and is in other respects as stated in Section 1.

Section 3

If a crime referred to in Section 1 is regarded as grave, imprisonment for at least six months and at most six years shall be imposed for gross fraud.

In judging the gravity of the crime, special attention shall be paid to whether the offender had abused public trust or employed a false document or misleading bookkeeping, or the crime otherwise had been of a particularly dangerous nature, had involved a substantial value or had resulted in a keenly felt loss.

Section 8

A person who, in a case other than those referred to earlier in this Chapter, acts dishonestly in that he, by misleading someone, induces him to do or not to do something and thereby harms him or someone he represents, shall be sentenced for dishonest conduct to pay a fine or to imprisonment for at most two years.

Section 9

A person who publishes or otherwise distributes among people misleading information in order to influence the price of an article, a security or other property, shall be sentenced for swindle to imprisonment for at most two years or, if the crime is petty, to pay a fine.

....

If a crime referred to in this Section is regarded as grave, imprisonment for at least six months and for at most four years shall be imposed.

Conclusion

103. This survey of the treatment of offences of theft and fraud in a number of different jurisdictions, both common law and civil, has shown a variety of approaches taken by other legal systems though with a number of common threads running throughout. It is sufficient here to highlight the fact that Scotland and Canada both possess general offences of fraud capable of being committed by single individuals. While in the United States of America and Australia there is no single and general offence of fraud, it is interesting to note that in both jurisdictions prosecutors have sought a broader and more flexible response to fraudulent conduct, with the American Federal Mail and Wire fraud statutes and the retention in Australia of offences of conspiracy to defraud. A distinctive feature of the civil law jurisdictions (and some common law jurisdictions) is the adoption of a tiered approach to offences with much higher maximum penalties for aggravated offences than for the basic offence.

APPENDIX B

GAMBLING SWINDLES

1. The field of gambling and betting has always been productive of a wide variety of frauds, and it has been necessary to legislate from time to time to ensure that so far as possible there is adequate control by the criminal law. Section 17 of the Gaming Act 1845 provides that:-

> "Every person who shall, by fraud or unlawful device or ill practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other ... any sum of money or valuable thing ..."

shall be guilty of an offence.[1] Another provision is contained in section 16(2)(c) of the Theft Act 1968 which makes it an offence for a person dishonestly by deception to obtain the opportunity to win money by betting. In addition some gambling swindles may be punishable as theft, or as obtaining property by deception, or as a conspiracy to defraud.

2. Section 17 is applicable without difficulty to cases where the dishonest person is actually participating in "cards, dice, tables, or other game", but where he is wagering on the result difficulties may arise. For example, if footballers agree to "throw" a match upon the

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1. The maximum penalty on indictment is two years' imprisonment; on summary conviction, it is six months' imprisonment, or a fine not exceeding £2,000, or both.

outcome of which they have wagered, the fraud or ill-practice would seem to be in the match itself. It would also seem that, in the first part of the section which deals with fraud in playing at cards etc., the words "other game" are to be read as ejusdem generis with "cards, dice, tables", particularly as the second part of the section, which deals with wagering, uses the wider words "any game, sport, pastime or exercise" as a subject of wagering. Further, it is arguable that winning money "in playing at" cards, etc., means to win money by playing to get a prize, or by means of a bet with an opponent, and not by a bet with a third party. To win the last mentioned is more aptly described by the expression "in wagering". But if the fraud is charged as being "in wagering", the money is, almost certainly, won not by reason of the deceit in wagering, but because of the loss of the game on which the money is staked.

3. Probably because of the complexities of section 17, charges of conspiracy to defraud at common law have been used in a number of cases where defendants have combined to rig an apparently fair contest, with a view to making a profit by betting on the result,[2] or have agreed to induce another to bet on what he thinks is a certainty, having so arranged things that he will lose the bet.[3] Conspiracy to defraud has also been used against those who combine to enter in a race a horse known to be mediocre, and in fact to run a better horse under the name of the first horse, having

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2. R v. Gould [1965] Crim.L.R. 547 (rigging football matches); R v. Mitchell [1967] Crim.L.R. 297 (doping horses); R v. Bleakley and Taylor [1967] Crim.L.R. 660 (introducing marked cards into a casino); cf. R v. Fountain [1966] 1 W.L.R. 212 which seems to have been regarded as a conspiracy to contravene section 17, though charged as a conspiracy to defraud.

3. R v. Hudson (1860) Bell 263; 8 Cox CC 305.

placed bets at good odds with a number of bookmakers. One case[4] involved three horses running in races on August Bank Holiday. Two of the horses were never intended to run and were withdrawn, so that all the money went on the third horse, "Gay Future", which had been secretly trained, its excellent form being known only to a few people. The horse won a minor race at very good odds. The defendants were convicted of conspiracy to defraud.

4. It is clear, in our view, that the substantive offences are not capable of dealing with all the situations which may properly be regarded as gambling swindles. The difficulties arising from section 17 of the Gaming Act 1845 have been mentioned. So far as the Theft Acts are concerned, there are problems in applying offences of theft and deception to some gambling swindles, because they may not always involve either an appropriation of property or an obtaining of property by deception.

5. In Working Paper No. 56 it was proposed that section 17 of the Gaming Act 1845 should provide more adequately and with greater clarity for frauds in connection with gambling than it does at present.[5] In addition it was thought necessary to cover conduct in this field which could only be caught by conspiracy to defraud. The paper suggested that the main mischief to be prevented was "the use, with intent to make a gain for oneself or another, or to cause loss to another, of any fraud, unlawful device or ill-practice to affect the outcome of any game or event, upon which anyone stands to lose or gain in money or money's worth, whether as a participant or by betting on the outcome". On consultation this proposal met with general

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4. R v. Collins and Murphy, The Times 12 February 1976 (Preston Crown Court).

5. See Working Paper No. 56, para. 66.

approval. One commentator,[6] however, expressed concern that, if the language used amounted to a drafting suggestion, the term "fraud" was redundant and "ill-practice" might be too vague, leaving the boundaries of the criminal law in the hands of the judge and jury rather than in the hands of the legislature.

6. In view of the inadequacy of the existing statutory offences to deal with gambling swindles it seems that one way of filling the "gap" in this area which would be left by the abolition of conspiracy to defraud would be, as the earlier working paper proposed, to replace section 17 of the Gaming Act 1845 with a new statutory offence. However, on further consideration we believe that the replacement offence proposed in the working paper requires modification or clarification in at least three respects.

7. The first point relates to the comment made on the working paper proposal in relation to the use of the terms "fraud" and "ill-practice". Although it might not wholly meet the criticism made, we think that it might be better to replace the terms "fraud, unlawful device or ill-practice" by the concept of "dishonesty".[7]

8. Secondly, the offence proposed in the working paper was limited to any "game or event". We do not think it was made sufficiently clear whether "event" was to mean any "happening" or "occurrence" or whether it was to be read in the context of "game" and be restricted to sporting events. Bearing in mind that bets are now frequently placed on other, non-sporting events, such as general elections, is

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6. Griew, [1975] Crim.L.R. 70, 79.

7. See paras. 2.4 and 12.18, above.

there any reason why such events should be excluded from the ambit of the protection offered by the offence?

9. Thirdly, we think that the offence proposed in the working paper was cast too narrowly in that it was restricted to those who affect the outcome of an event by fraud. We think it should also cover those who dishonestly affect the amount of money which stands to be won or lost by betting on the outcome of an event. This extension should enable the offence to cover the kinds of case referred to in paragraph 3 above in which conspiracy to defraud has been charged.

10. Provisionally, we think that such an offence should be triable either way (that is either in the Crown Court or in magistrates' courts) and that a maximum penalty on indictment of five years' imprisonment would be appropriate.

11. Thus, on the basis that conspiracy to defraud is to be abolished and replaced by a series of discrete offences (option (C)), we propose an offence which would penalise anyone who dishonestly affects the outcome of any event upon which anyone stands to lose or gain in money or moneys' worth, whether as a participant or by betting on the outcome, or dishonestly to affect the amount which stands to be lost or gained by betting on the outcome of any such event, in each case with intent to make a gain for oneself or another, or to cause loss to another. Section 17 of the Gaming Act 1845 would be repealed. We would welcome comments on this proposal.

APPENDIX C

CONSPIRACY TO AID AND ABET OR FACILITATION: SHOULD THEY BE CRIMES?

1. In our consideration of what offences might be created in place of conspiracy to defraud, we considered, under option (C), the case for creating a new offence aimed at anyone who makes, sells (etc.) or possesses any article which he knows or believes is or is likely to be used in the commission of any offence involving fraud.[1] We explained that such an offence could be used, among other things, to deal with individuals such as the defendants in Hollinshead.[2] In this Appendix, we raise for consideration two further possible alternative changes to the law to meet this type of case. These are: (i) to create an offence of conspiracy to aid and abet or (ii) to create a new general inchoate offence of facilitation. Either change would go far beyond the limits of fraud because they would relate to crimes generally.

A. Conspiracy to aid and abet

2. Attempting to aid and abet the commission of an offence is not a crime[3] and it is probably also not an offence to incite[4] or conspire with another person to aid

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1. See paras. 10.29-10.36.

2. [1985] A.C. 975.

3. Criminal Attempts Act 1981, s. 1(4)(b); see also Report on Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980), Law Com No. 102, para. 2.123.

4. Bodin [1979] Crim.L.R. 176.

and abet. It is clear that the basis of the decision in Hollinshead was that the conspiracy amounted to a conspiracy to defraud and at the time, following upon Ayres,[5] that decision necessarily implied that the conduct of the defendants amounted neither to any other substantive offence nor a statutory conspiracy to commit one.[6] It is also possible to take the view that the activities of the defendants would necessarily have amounted to aiding and abetting an offence by others who were actually to use the devices concerned in order to defraud the electricity authorities. A charge of aiding and abetting could not have succeeded unless and until the substantive offence had itself been committed. The conduct might, however, have amounted to a conspiracy to aid and abet; but by rejecting this possibility the House of Lords implicitly held that no such charge is possible.

3. Should conspiracy to aid and abet the commission of an offence be capable of being charged? The possibility of bringing such a charge would have enabled persons like the defendants in Hollinshead to be convicted without relying on conspiracy to defraud. In the absence of an offence of facilitation (see below), it would also perhaps have provided a more suitable charge for cases like Anderson[7] and Invicta Plastics v. Clare.[8] There are therefore cases which can be envisaged where the social danger of such activities (agreeing to provide assistance to someone who is intending to commit a crime but who has not got as far as

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5. [1984] A.C. 447; see para. 1.3, above.

6. See now Criminal Justice Act 1987, s. 12.

7. [1986] A.C. 27; see para. 7(iii), below.

8. [1976] R.T.R. 251; [1976] Crim.L.R. 131; see para. 7(ii), below.

the attempt) is such that they should be brought within the scope of the criminal law.

4. There would, however, be several disadvantages in permitting a charge of conspiracy to aid and abet. First, since it would be based on conspiracy, it would only deal with conduct by two people, and not conduct by an individual acting alone. Conduct involving the deliberate facilitation of an offence, where the offence itself has not been committed, would in general remain outside the scope of the criminal law, unless it amounted to incitement or to a specific substantive crime. Second, it would contradict the principle that inchoate liability attaches only to acts performed in preparation of a distinct substantive offence: aiding and abetting is not itself an offence but only a means of participating in an offence.[9] Third, it would be illogical to permit a charge of conspiracy to aid and abet, but fail to admit the possibility of a charge of an attempt or incitement to aid and abet. The Commission concluded in 1980 that there should be no offence of attempt to aid and abet on the grounds that "the factual situations which can be envisaged seem ... too remote from the commission of the ultimate offence to warrant [such a charge]" and this was accepted by Parliament.[10] It would of course be possible for the policy here to be reversed. There seems to be no logical reason for distinguishing between the three inchoate offences in this respect: if one charge is permitted, all three surely ought to be permitted? The fourth disadvantage would be that this approach may be regarded as a complex way of striking at behaviour which ought to be punished. A more straightforward solution may lie in the creation of an offence of facilitation, considered next.

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9. Smith, "Secondary participation and inchoate offences" in Crime, Proof and Punishment (1981), p.36.

10. See n.3, above.

B. Facilitation

5. Under the existing law of accessoryship, a person may incur liability for a completed offence by virtue of his rendering assistance to the principal offender without necessarily soliciting or encouraging the principal. On the other hand to incur liability for incitement requires an element of persuasion and the mere giving of assistance is neither necessary nor sufficient. It follows that unless specific offences involving facilitation are applicable or a conspiracy is involved, a person who supplies articles for use in the commission of crime may not incur liability unless and until the user of the article commits an offence or proceeds as far as an attempt.

6. This state of the law has been criticised as both illogical and unsupportable in policy terms. It has recently been argued[11] that it produces difficulties and strains in other areas of the law as the courts seek to overcome or minimise the consequences of the distinction between accessory liability and the offence of incitement. It has been suggested that these difficulties could be avoided and a gap in the criminal law filled by the creation of an offence of facilitation which is not dependent upon the commission of the offence facilitated.

1. The arguments in favour of an offence of facilitation

7. As already touched on above, one argument which has been advanced for an offence of facilitation is the effect which the absence of such an offence has had on other parts of the criminal law, namely that it creates a theoretical

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11. Spencer, "Trying to help another person to commit a crime" in Criminal Law Essays (1987), pp.148-169 (hereinafter "Spencer").

gap in the criminal law through which undeserving criminals threaten to escape and that the courts fill it by stretching the ambit of other offences causing undesirable side-effects.[12] Four such areas have been identified:

(i) Accessory liability - the old rule of liability as a secondary party for a person who furnished help or advice in advance of a crime was that he must know the details of the crime which the principal was planning.[13] Such a person can now be convicted as an accessory whether or not he knew the time and place where the crime was to be committed, as long as he knew the general type of crime which was to be committed.[14] Although this approach enables the law to deal with a number of people who deserve to be punished, arguably it fails to deal with many of those who should be caught.

(ii) Incitement - In Invicta Plastics v. Clare[15] the defendant manufactured a device (Radatec) which detected police speed traps whenever it came near one. His advertisement of this device in the press led to his conviction for inciting others to use unlicensed apparatus for wireless telegraphy. It was proved that it was almost impossible to use the device without committing the offence. In upholding his

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12. Spencer, pp.149-158.

13. See e.g. Lomas (1913) 9 Cr.App.R. 220.

14. Bainbridge [1960] 1 Q.B. 129 and Director of Public Prosecutions for Northern Ireland v. Maxwell [1978] 1 W.L.R. 1350.

15. [1976] R.T.R. 251.

conviction on appeal, the Divisional Court rejected the argument advanced on his behalf that what he had done was not capable of amounting to incitement. It is argued that incitement as a weapon against facilitation is either too narrow or (less likely) too wide.[16]

(iii) Conspiracy - In Anderson[17] the defendant agreed to assist in the escape of a prisoner from prison. He was held by the House of Lords to be guilty of conspiracy (as a principal offender) because he intended to play some part in the agreed course of conduct, even if he neither intended the escape plan to succeed nor believed that it could do so. The implication of the decision is that there may be a conspiracy although no conspirator actually intends that the offence agreed upon shall be committed, which appears not to be a possible reading of the statute.

In relation to conspiracy to defraud, it is argued that the decision in Hollinshead which makes it possible to convict those who facilitate others to commit electricity meter frauds, also makes an offence which was already vague and amorphous even more so.[18]

(iv) Obstructing the police - It is argued that this offence has been extended (by the courts) in an undesirable way which would not have been

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16. Spencer, p.152.

17. [1986] A.C. 27.

18. Spencer, p.156.

necessary had there been an offence of facilitation.[19]

8. It has also been argued that severing the link between accessory liability and the commission of an ulterior offence would give recognition to the fact that what is sought to be controlled by accomplice liability is conduct tending to encourage crime in others, whether or not those crimes are in fact committed.[20] Where the accused gives aid or furnishes equipment preparatory to the commission of the principal offence, he does the guilty act which the law seeks to forbid at that time, and to link his culpability to the subsequent actions of the principal is highly artificial.

9. Such a separation, it has been argued, might help in law enforcement, since the police would not have to wait for the commission of the principal crime before arresting the accessories.[21] Moreover, there may be uncertainty as to whether the principal offender has committed the offence, yet there may be abundant evidence of the facilitator's role.

10. The existing specific offences which penalise particular types of facilitation in particular circumstances[22] do not cover all the cases which arguably ought to be covered and some anomalies arise. (It has been pointed out, for example, that it is an offence to lend a knitting needle for an abortion, but not an offence to lend

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19. Spencer, pp.156-158.

20. Buxton, (1969) 85 L.Q.R. 252; [1973] Crim.L.R. 223.

21. Ibid., at pp.270 and 228 respectively.

22. Some examples of these were given at paragraph 10.31, above.

a knife to commit a murder (unless the murder is attempted or committed[23]).

11. The final point is that other jurisdictions provide offences of facilitation.[24]

2. The arguments against

12. One argument is that general liability for facilitation would be out of proportion with the liability of the person who is helped. Why should Y the person who supplies X with a jemmy knowing that he wants it for a burglary, be guilty of facilitation when X, who is arrested as he is about to leave his house armed with the jemmy to commit the burglary, would not be guilty of any offence? The justification for this may be that X is a long way from his objective and he still has the opportunity to change his mind, whereas Y has done the last act he is able to do. The fact that Y could still take steps to undo the harm may be an argument for allowing a defence of withdrawal to facilitation.[25]

13. Another argument against is that an offence of facilitation would be over-broad and oppressive. This of course depends on the scope of the offence. It need not be wider than the existing law of accessoryship where the person helped gets as far as committing or attempting the crime for which help was provided. It would be wider, but only because it would occur whether or not the ultimate crime was committed or attempted.

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23. Spencer, p.158.

24. Spencer, pp.164-166.

25. Spencer, p.159.

3. How might the offence be defined?

14. It has been suggested[26] that an offence of facilitation should be aimed at two things:

(i) providing another with equipment, advice or other help for use in the commission of a crime; and

(ii) offering equipment, advice or other assistance which is intended to be helpful in the commission of a crime.

The real difficulty concerns the question of the appropriate mental element for the offence. One suggestion is that the offence should only be committed by someone who knew or believed that what he did or offered to do would help another person to commit a crime. Mere suspicion that a crime might be committed would not be sufficient.

15. Such a mental element would ensure that most ordinary commercial transactions were not penalised. On the other hand it would not excuse the person who knows (or believes) that what he does will help another to commit an offence, but who acts intending to cause a more than compensating good or to avoid a different, and worse evil. A defence of acting "without reasonable excuse" could be included to provide an appropriate let out for such persons.

C. Conclusion

16. No conclusion is reached here on either of the two offences considered above. We would however be interested to receive comments on the matters discussed in this

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26. Spencer, p.161 et seq.

Appendix. In the light of such comments as are made on these matters, we would then need to consider whether a further more detailed study of either suggestion was called for.

APPENDIX D

FRAUD OFFENCES TRIED IN THE CROWN COURT: 1982 - 1985[1]

Obtaining property by deception (Theft Act 1968, s.15)

	For trial	Acquitted	Guilty[2]
1982	2868	371	2448
1983	3298	349	2882
1984	3813	390	3365
1985	4083	423	3592

Conspiracy to defraud

1982	882	162	705
1983	956	154	786
1984	618	160	443
1985	223	45	171

All other offences of fraud[3]

1982	888	175	683
1983	1029	168	834
1984	993	168	791
1985	1014	159	821

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1. The statistics quoted were supplied to us by the Home Office.

2. By plea or verdict.

3. Viz. False statements by company directors; Fraudulently inducing persons to invest money; Other frauds by company directors; False accounting; Obtaining pecuniary advantage by deception; Dishonestly procuring execution of a document; Obtaining services by deception; Evasion of liability by deception; Making off without payment; Other frauds.

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